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A Historical Analysis of Federal Statutes, Rules, and Court Cases Related to the Expulsion of Handicapped Children: Recommendations and Criteria for Policy Development

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A HISTORICAL ANALYSIS OF FEDERAL STATUTES,
RULES, AND COURT CASES RELATED TO THE
EXPULSION OF HANDICAPPED CHILDREN:
RECOMMENDATIONS AND CRITERIA
FOR POLICY DEVELOPMENT

by
Roger D. Wagner

A Dissertation Submitted to the Faculty of the Graduate
School of Loyola University of Chicago in Partial
Fulfillment of the Requirements for the Degree of
Doctor of Philosophy
January
1991

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ABSTRACT

The purpose of this study was to address the application of expulsion to students with handicaps within legal parameters of disciplinary policy and procedures of public school systems. The research questions addressed included, "What was the original intent behind the federal law applicable to expulsion of handicapped students?"; "What is the federal law applicable to expulsion of handicapped students?"; "What patterns, if any, have developed from application of federal law regarding expulsion of handicapped students?"; and "How have federal court cases interpreted federal law and the policies that have been developed to implement that law?"

A documentary research approach was used analyzing primary and secondary sources between November, 1975 and February, 1989. Two case studies were completed on large public school districts in Illinois and Florida analyzing disciplinary policy development applied to handicapped students. Twelve federal court cases were identified and analyzed. Criteria for policy development were formulated for application within any school system.

Conclusions and recommendations found that expulsion of handicapped students is not directly addressed in any

federal legislation nor rules and regulations. The intent of the Education for All Handicapped Children Act and Section 504 (identified as the major federal statutes applicable to expulsion of students with handicaps) was not to impart greater rights to the handicapped but to treat the handicapped as equals with the non-handicapped. Trends identified and recommendations included consideration of the relationship between the student's behavior and handicapping condition; the relationship issue could only be addressed by a multidisciplinary team familiar with the student and handicapping condition; the decision to expel should include the parent; immediate removal of student considered a danger to self or others remained possible but only for ten days; and parents can challenge expulsion through the due process model under EAHCA. If challenged, the student remained in the previous placement or that placement directed by the court unless an agreement was reached with parents for alternative placement. Expulsion of students with handicaps can occur with complete cessation of all educational services except in the 5th federal circuit where expulsion from school can occur but without complete cessation of educational services.

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Chapter I

INTRODUCTION

Can a handicapped student be disciplined like all other students attending public schools today? This critical question continues to be asked despite landmark legislation passed in 1975 that guarantees all handicapped children a free and appropriate education.¹ Does the law and its implementing regulations help school administrators address this question? The United States Court of Appeals, ninth circuit, considered this question as it addressed a district court ruling on the issue of expulsion of handicapped children:

Our examination of the EAHCA and its regulations has left us with the firm conviction that federal law respecting the educational rights of handicapped children is not a model of clarity. As we have indicated, the issues are exquisitely difficult. Their avoidance by Congress and administrators is understandable. Courts, however, must confront those questions fairly presented to them.²

The decision as a society to educate our children has been essential to the development and maintenance of our

¹P.L. 94-142, The Education for All Handicapped Children's Act.

²Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986), 1495-96.

democracy. Education is not a constitutional right³.

Education is the responsibility of the states⁴. All states have chosen to provide and make mandatory the attendance of children ages five through eighteen.⁵ Time has tested the need and value of education to our society. Its importance is stated very clearly in the landmark *Brown v. Board of Education* decision of 1954:

Education is required in the performance of our most basic responsibilities. It is the very foundation of good citizenship. It is the principal instrument for awakening the child to cultural values, in preparing him for later training, and in helping him to adjust normally to his environment. It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Today, education is perhaps the most important function of the state and local governments. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms.⁶

There has always been a segment of the school population that has created problems and caused those in charge to consider and decide, in the interest of the majority, that some children should not be permitted to

³San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

⁴Fourteenth amendment, Constitution of the United States of America designating that all powers not authorized by the U.S. Constitution are delegated to the states.

⁵R.F.Campbell, L.L. Cunningham, R.O. Nystrand, and M.O. Usand, The Organization and Control of American Schools, 5th ed., (Columbia: Charles E. Merrill, 1985) 16.

⁶*Brown v. Board of Education of Topeka*, 347 U.S. 483, 493 (1954).

attend and to be kept out of school through disciplinary exclusion. Chief Justice Shaw in the *Spear v. Cummings* decision said that:

The law provides that every town shall choose a school committee, who shall have the general charge in all the public schools in such town, and that this includes the power of determining what pupils shall be received and what pupils rejected. The committee may for good cause determine that some shall not be received as, for instance, if infected with any contagious disease, or if the pupil or parents have refused to comply with regulations necessary to the discipline and good management of the schools.⁷

One hundred years later, Robert Burgdorf's research on the legal rights of the handicapped demonstrated the impact of this attitude on the handicapped as a class:

Any person who deviated from the norms of what was expected of a pupil, and thereby caused extra work for the teacher, was viewed as disruptive and burdensome and thus not suited for classroom instruction. As a result of either formal policy or informal practices most handicapped children did not attend the public schools.⁸

Significant action occurred in the courts during the 1960s and 1970s initiating deserved momentum on behalf of the handicapped as a class. The *Mills*⁹ decision and the

⁷Finley Burke, A Treatise on the Law of Public Schools, (New York: A.S. Barnes and Company, 1880), 97.

⁸Robert L. Burgdorf, Jr., The Legal Rights of Handicapped Persons: Cases, Materials, and Text, (Baltimore: Paul H. Brooks, 1980), 55.

⁹*Mills v. Board of Education*, 348 F.Supp. 866 (D.D.C. 1972).

PARC¹⁰ decision were critical in addressing questions such as if the handicapped should be educated and to what extent does that right to be educated entitle them to equal services? The beginning of the definition of how handicapped children were to be educated started to take shape. The handicapped began to be recognized as a class who qualified for the right to be educated and eligible to exercise that right the same as all others. The *Brown* decision, while more directed at the racial problem at the time, significantly addressed a problem encountered by distinct classes of individuals--an identical dilemma which faced the school aged population with handicaps.

Senate Bill 6, which became known as P.L.94-142, was passed and signed into law by President Gerald Ford on November 29, 1975.¹¹ This law, scheduled to be implemented by October 1977, was and continues to be proven to be the most significant piece of legislation ever passed to assist the education of handicapped children and youth. Just prior to its passage in 1974, the U.S. Comptroller General provided Congress with a detailed report and documentation illustrating the current availability of education to handicapped children and youth. The report dramatically revealed that only 40 percent of the nation's handicapped

¹⁰Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania, 343 F.Supp. 279 (E.D. Pa. 1972).

¹¹The Education for All Handicapped Children Act, 20 U.S.C. § 1400 et seq.

children were receiving appropriate schooling and that over one million handicapped children were excluded entirely from the public school system. Only sixteen states were providing special education services to more than 50 percent of their handicapped school-aged population. The report also revealed that very few districts were able to provide comprehensive services flexible enough to meet all the needs of this special population. Fragmented, uncoordinated, and restrictive were the terms used to describe existing policies related to eligibility and provision of services.¹² As a result, unparalleled bipartisan support in the Congress, advocacy groups, and local school districts created an equal opportunity for the handicapped to receive an appropriate education.¹³ The accompanying regulations serve as administrative law which has proven to be significantly stable in the provision of rights and services to the handicapped and their parents.

Not to be overlooked is the significant civil rights law, the Vocational Rehabilitation Act of 1973, which contains the most pivotal statement in history relative to the government and the rights of handicapped individuals within that government's jurisdiction:

¹²U.S. Comptroller General. Federal Programs for Education of the Handicapped: Issues and Problems. Washington DC: U.S. Government, 1974.

¹³J.C. Pittenger and P. Kuriloff, "Education of the Handicapped: Reforming a Radical Law," The Public Interest, 72 (December, 1982), 96.

No otherwise qualified handicapped individual in the United States, as defined in section 706 (60 of this title) shall, solely by reason of his handicap, be excluded from his participation in, be denied the benefits of, or be subjected to the discrimination under any program receiving federal financial assistance.¹⁴

Challenges continue to occur relative to who should be educated, how, and under what circumstances. The question "has equal protection gone too far?" is raised often in relation to discipline and expulsion of the handicapped. There is a concern that a double standard exists. Educators seek guidelines and structure to both assist them in carrying out their roles as well as to insure protection and accountability so evident today in our schools. While the courts are reluctant to make educational decisions, they are too often called on to do so.¹⁵ When this happens, the time delay is so lengthy that the individual case in question typically changes in character considerably by the time the decision is made. Court decisions become instructive as the bottom line for interpretation.

Several forces exist to help handicapped students and individuals who are responsible for providing education. In this study, federal court cases, federal legislation and federal regulations are historically analyzed since the passage of PL 94-142 on November 29, 1975 in an attempt to

¹⁴Rehabilitation Act of 1973, 29 U.S.C. § 794.

¹⁵Victoria L. v. District School Board of Lee County, 741 F.2d 369, and Honig v. Doe, 108 S.Ct. 592.

help construct criteria which can be used to develop effective policy on expulsion of the handicapped student. The history of suspension/expulsion policy development at the local education level within the context of the total responsibility for educating handicapped children and youth ages three to twenty-one as part of the total school age population was examined for two districts. This class, this group of children with handicaps, continues to fight for their rights to basic education and recognition as potentially contributing members of our society¹⁶.

Entitlement to the right to be educated suddenly became accepted for the handicapped as a result of this landmark federal legislation whose evolution can be traced from the history and struggle through the courts. Challenges continue to be made to test the established right to education of the handicapped. The Supreme Court was recently faced with another experience to reaffirm and define education for the handicapped in the Timothy W. case. This case considered both limits and the basic fundamental right of an individual to be educated.¹⁷

A legal opinion rendered on July 24, 1980 by the

¹⁶John Gliedman and William Roth, for the Carnegie Council on Children, The Unexpected Minority: Handicapped Children in America, (New York: Carnegie Corporation, 1980).

¹⁷Timothy W. v. Rochester School District, EHLR 558:417, N.H.(December, 1987).

Attorney General of the Commonwealth of Virginia addressed inappropriate behavior in the area of drug related offenses committed by a student with a handicap. This opinion reflected the confrontation and dilemma faced then by law enforcement agencies as attempts were made to promote justice and orderly, fair enforcement of the law:

The inquiry was whether a school board's regulations regarding suspension of students for drug-related offenses may be enforced against handicapped children in view of the applicable State and Federal laws prohibiting discrimination on the basis of a handicap. The opinion holds that a school district has a right to discipline special education students subject to certain procedural safeguards required by State and Federal law. A determination must be made as to whether or not there is a causal relationship between the handicap and the misconduct. If there is a direct relationship between the handicap and the disruptive conduct, and it is necessary to remove the student from the school then the student's placement should be changed in accord with the prescribed procedures. If there is no relationship established, the handicapped child will be subject to the normal disciplinary procedures.¹⁸

John Gardner placed the issue in a more global, appropriate context which represents a fairly conservation yet logically rational point of view:

The educational system provides the young person with a sense of what society expects of him in the way of performance. If it is lax in its demands, then he will believe that such are the expectations of this society.¹⁹

¹⁸Opinion to the Honorable George R. St.John; County Attorney for the County of Albermarle, Uly 24, 1980, 2.

¹⁹John W. Gardner, Self-Renewal: The Individual and Innovative Society, (New York: W.W. Norton and Co., 1981), 28.

Purpose of the Study

School expulsion continues to challenge the rights of all students to receive education. Its impact on the handicapped within the context of equal rights for all represents a confrontation. There is a contention that handicapped children/youth receive preferential treatment and have more rights than others. It is this confrontation that this study addressed to assist schools with policy development in this sensitive area to ensure that all rights are observed and fairness prevails. This issue and the policy that defines appropriate consequences is an important stage of learning. Use of this disciplinary authority of local boards of education is struggling for legitimacy due to past existence and potential for permitting discrimination against the handicapped.

Research Design and Procedures

A documentary research approach was used with this study which describes and analyzes relevant primary and secondary sources. Research questions to be addressed included, "What was the original intent behind the federal law as it applies to expulsion of handicapped students?" This analysis first focused on the original intent behind the federal law P.L. 94-142. Also, the Congressional Record, committee reports, and hearings on the law and their accompanying regulations contribute to establish the original intent related to expulsion of the handicapped and

the feeling tone of our society which led to the development and need for such a law. The rules were treated separately in this section as there have been attempts to change the law and the rules in 1982 and 1989.

The second research question asked, "What is the federal law applicable to expulsion of handicapped students?" Primary sources in this analysis include a review of the major legislation and court cases leading to development of the law.

The third research question addressed by the study asked "What patterns, if any, have developed from application of federal law regarding expulsion of handicapped students?" The application of federal law was analyzed as it applied to expulsion of the handicapped within each specific case. Since the law does not specifically address this issue, special attention was focused on the key factors of the law indirectly related to this issue which includes development and implementation of policies which:

- (1) identify all handicapped children and offer them educational services
- (2) assess each handicapped child individually and formulate a written Individualized Education Program (IEP)
- (3) ensure that handicapped students are placed in the least restrictive environment (LRE-education with non-handicapped to the greatest extent possible) commensurate with their needs

- (4) notify parents in writing about identification, evaluation and school placement of their child and establish grievance procedures for parents wishing to contest a district decision
- (5) provide those related services required for children to benefit from the special education provided

A fourth research question asked "How have federal court cases interpreted federal law and the policies that have been developed to implement that law?"

Secondary sources used included professional journals, texts, studies, doctoral dissertations, educational newspapers, newsletters, and other publications. The research was assisted by utilizing standard library research tools of ERIC, Dissertation Abstracts, and INFOTRAC. Searches were also completed for court cases and legal journal documents and publications using electronic data bases SPECIALLAW, LEXIS, WESTLAW, and SPECIALNET. The *Education for the Handicapped Law Report*, and *Education of the Handicapped* were most helpful in locating topical information and analysis of existing and proposed rule making related to the topic. Trends and interpretations were identified where they existed. These trends and interpretations were analyzed for their influence on local school policy development as it relates to the suspension and expulsion of handicapped children and youth.

Finally, criteria were developed for formulating effective local school policy. The Courts have told school

officials and attorneys repeatedly that judgement and policy making should be left to school officials, not the court. These criteria attempt to foster an understanding of our progress and mistakes over time related to expulsion of the handicapped. Considerable effort has been made to get the handicapped into schools, to exercise their similar right to education that has always been enjoyed by their non-handicapped peers. Why suddenly is there so much concern about the handicapped being required to follow rules established for all school children? Schools are to help all children become productive, contributing members of our society. Respect for rules and the need for singular standards and laws for all is an expected outcome in programming for the handicapped. And yet, schools and our society cannot revert back to exclusionary tactics of inappropriate programming, indefinite suspension from programs, and discrimination based on handicap.

Scope and Limitations of the Study

This study was limited to federal court cases, federal statutes and implementing regulations from 1975 to February, 1989. This limitation existed knowing that this body of knowledge did lend itself to greater analysis because of its volume. State and federal education agencies have done little to provide direction and assistance to local districts in this controversial area. It is recognized that a wide range of variation exists locally and among states in

their provision of services to handicapped children and youth. The intent of this study was to identify trends using only federal court decisions which limits the scope of the study.

Definition of Terms

Public Law 94-142 (EAHCA)

Public Law 94-142, the Education for All Handicapped Children Act signed into law on November 29, 1975, is a federal mandate to provide free and appropriate education for all handicapped children ages 3-21. Its major requirements include required identification of handicapped children through the case study process. A plan based on each child's needs is required to be formulated with emphasis placed on educating the handicapped child with non-handicapped and as close to the child's home school as possible. Parental involvement in the total process is required. Procedural safeguards, including informed consent and formal due process for disagreements between parents and school, are critical to the assurance that the education is being provided at no cost to the parent. This act makes it clear that the federal government intends that all handicapped children have equal access to and opportunity for an appropriate education. Every opportunity available to regular students is to be available to the handicapped as

determined by the case study evaluation and multidisciplinary staffing processes.²⁰

Handicapped Children

Handicapped Children are defined as those children evaluated in accordance with federal regulations as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services.²¹

²⁰The EAHCA act refined previous attempts by Congress to ensure the education of the handicapped children of the nation. In 1966, Congress enacted the Elementary and Secondary Education (ESEA) amendments, PL 89-750, which created a program of grants to assist states, a National Advisory Committee on Handicapped Children, and a Bureau of Education for the Handicapped within the Office of Education. This was known as Title VI. In the ESEA of 1970 known as PL 91-230, Congress repealed Title VI and created the forerunner to EAHCA. The amendments continued to provide grants to the states, and maintained the Bureau and the National Advisory Committee. In addition, Congress allocated grants for research, program development, personnel development, and curriculum development and dissemination. In 1974, Congress extended the provisions of the 1970 amendments for three years in the ESEA amendments of 1974, PL 93-380. The 1974 amendments increased the funding, and added due process procedures and privacy safeguards. The 1974 enactment also set a goal of free, full educational opportunities for all handicapped children, as priority for use of the funds, and required plan from each state to show that the handicapped children were being served in regular schools and with non-handicapped children (a concept called LRE--least restrictive environment) whenever possible.

²¹Education for All Handicapped Children Act Regulations, 34 C.F.R. 300.530-534.

Suspension

Suspension is defined as the temporary removal of a student from a regular or special school program for a period not to exceed ten (10) school days.

Expulsion

Expulsion is defined as the removal of a student from the public schools by the School Board for a period of time not to exceed the remainder of the school year.

Exclusion

Exclusion is defined as a disciplinary action to remove for an indefinite period of time an age eligible student from any opportunity to receive education from the public school system that the student would normally attend. This action is typically taken to protect the school decorum and/or environment for the good of the whole. Exclusion, as used in this study, does not describe any issue based on health or immunization factors, and eligibility, educability, or academic admission criteria.

Special Education

Special Education, as defined by the P.L.94-142 regulations, means specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.²² A special

²²Ibid., 300.14.

comment accompanies this definition to note its particularly importance since a child is not handicapped unless he or she needs special education. Also noted is the importance of this definition on related services since a related service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no "related services," and the child (because not handicapped) is not covered under the act.²³

Related Services

Related services is defined as transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology, audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes, school health services, social work services in schools, and parent counseling and training.²⁴

Individualized Education Program (IEP)

IEP refers to the Individualized Education Program which represents a written statement summarizing the special education and related services determined necessary for the student to receive a free, appropriate education. The IEP

²³Ibid.

²⁴Ibid., 300.13.

establishes an agreement between home and school and a commitment by the school district as to what resources will be committed yet is not considered a contract. The standards for minimum content set down by P.L. 94-142 regulations include:

- (a) A statement of the child's present levels of educational performance
- (b) A statement of the child's annual goals, including short term instructional objectives
- (c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs
- (d) The projected dates for initiation of services and the anticipated duration of the services
- (e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved²⁵

Least Restrictive Environment (LRE)

LRE is defined as:

- (1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions for other care facilities, are educated with children who are not handicapped and
- (2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment

²⁵Ibid., 300.346, 20 U.S.C. §§ 1401(19); 1412 (2)(B)(4),(6); 1414(a)(5).

occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.²⁶

Placement

The definition of placement is a part of the concept of the IEP. Placement refers to the physical location of where the handicapped child will receive the special education and related services determined necessary to meet the student's identified needs. Accordingly, the following conditions must be addressed and assurances provided by local educational agencies which, in turn, essentially define the terms of the placement:²⁷

Each handicapped child's educational placement:

- (1) Is determined at least annually
- (2) Is based on his or her individualized education program
- (3) Is as close as possible to the child's home
- (4) Requires the handicapped child's individualized education program, unless some other arrangement is made, to be provided in the school which he or she would attend if not handicapped
- (5) Shall be in the least restrictive environment. Consideration is to be given to any potential harmful effect on the child or on the quality of services which he or she needs

²⁶20 U.S.C. §§ 1412(5)(B); 1414(a)(1)(C)(iv); Reg. 34 C.F.R. 300.550.

²⁷20 U.S.C. § 1412(5)(B); EHA Reg. 300.552.

The special comment added to this section focused special emphasis reflected from public testimony and written suggestions submitted to the Office of Education:

Comment: Reg.300.552 includes some of the main factors which must be considered in determining the extent to which a handicapped child can be educated with children who are not handicapped. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to insure that each handicapped child receives an education which is appropriate to his or her individual needs.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973(34 CFR Part 104--Appendix, Paragraph 24) includes several points regarding educational placements of handicapped children which are pertinent to this section:

1. With respect to determining proper placements, the analysis states:"* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her need * * *."

2. With respect to placing a handicapped child in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parents' right to challenge the placement of their child extends not only to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subject.

IEP Meeting

As required by P.L.94-142²⁸, each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.²⁹ The participants must include:

- (1) A representative of the public agency, other than the child's teacher, who is qualified to provide or supervise the provision of special education.
- (2) The child's teacher.
- (3) One or both of the child's parents, subject to Reg.300.345.³⁰
- (4) The child. where appropriate.
- (5) Other individuals at the discretion of the parent or agency.

²⁸20 U.S.C. §§ 1412(2)(B)(4),(6); 1414(a)(5); EHA Reg.300.343.

²⁹20 U.S.C. §§ 1401(19); 1412(2)(B)(4),(6); 1414(a)(5); EHA Reg. 300.344.

³⁰Reg.300.345 requires that "(a)Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including: (1)Notifying parents of the meeting early enough to insure that they will have an opportunity to attend, and (2)Scheduling the meeting at a mutually agreed on time and place. (b)The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance. (c)If neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls. (d)A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place.

- (6) Evaluation personnel--for a handicapped child who has been evaluated for the first time, the public agency shall insure:
- (a) That a member of the evaluation team participates in the meeting; or
 - (b) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.³¹

Case Study Evaluation

A case study evaluation is defined as the formal evaluation process completed when a child is determined through the screening process or otherwise referred for consideration of eligibility for special education. The intensity of this process is determined by the complexity of the child's problems. Generally, the following are required:

- 1) An interview with the child
- 2) Consultation with the child's parent
- 3) A social developmental study, including an assessment of the child's adaptive behavior and cultural background
- 4) A report regarding the child's medical history and current health status
- 5) A vision and hearing screening, completed at the time of the evaluation or within the previous six months
- 6) A review of the child's academic history and current educational functioning

³¹Ibid.

- 7) An educational evaluation of the child's learning processes and level of educational achievement
 - 8) An assessment of the child's learning environment
 - 9) Specialized evaluations specific to the nature of the child's problems.
- a) A psychological evaluation by a certified school psychologist, with the extent to be determined by the individual situation, shall be required:
- i) In order to place any child in a special education placement for children with mental impairment
 - ii) In order to place any child in a special education instructional program
 - iii) In order to place any child in a special education placement for children with behavior disorders
 - iv) In order to place any child where there are questions about his or her intellectual functioning and/or learning capacity.
 - v) A psychological evaluation for all other children shall be considered optional.
 - vi) As appropriate, the psychologist may limit this evaluation to a review of the results of tests administered by other school district personnel and/or the results of externally administered evaluations, an analysis of the learning environment and learning processes, participation in the multidisciplinary conference and such other procedures as deemed necessary.
- b) An appropriate medical examination by a physician licensed to practice medicine in all of its branches shall be obtained, for diagnostic and evaluation purposes, for any child with either a suspected physical, health, vision or hearing impairment. This examination shall be conducted at no cost to the parent. Nothing in these regulations shall be construed to require any child to undergo any physical examinations or medical treatment whose parents or guardian object thereto on the grounds that such examinations

or treatment conflict with his or her religious beliefs.

- c) A certified speech and language clinician shall administer a comprehensive evaluation for any child suspected of having a speech or language impairment.
- d) For all children, other specialized evaluations appropriate to the nature of the child's problems shall be provided at not cost to the parents. When specialized evaluation procedures not usually provided by the local school district are required to provide a better understanding of the child's educational or educationally related problems, the local school district recommending such evaluations procedures shall be responsible for assisting the parents with locating and making use of appropriate local and/or state resources
 - i) Consideration shall be given to resources of state agencies or third party payers.
 - ii) The child may not be prohibited from receiving a special education program or service because he or she is financially otherwise unable to obtain specialized evaluation procedures.
- e) An audiological evaluation appropriate to the needs of the child shall be provided by an audiologist when necessary.³²

Multidisciplinary Staff Conference (MDSC)

A multidisciplinary staff conference (MDSC) is defined as a conference attended by the multidisciplinary team which completed the evaluation of the child. At least one member of this team must be the child's teacher or other specialist with knowledge of the suspected disability which usually includes health, vision, hearing, social and emotional

³²23 Illinois Administrative Code, Chapter I, § 226.535.

status, general intelligence, academic performance, communicative status, and motor abilities.³³ Parents are required to be invited to attend and participate in this conference.

School Service Team

The school service team is defined as school staff who are familiar with the child and support staff knowledgeable about child growth and development that assist the school population through screening and consultation with the teaching staff relative to individual student performance within the school setting. This process is generally informal and concerned about the student's instructional level and behavior exhibited within the classroom and overall school setting.

Organization of the Study

Chapter One of this study identified the issue of expulsion as a significant variable to the full implementation of education for all handicapped children. The issue was placed in a historical perspective to enhance the contextual meaning and intent of an ambivalent and controversial topic. The historical impact of exclusion and expulsion was contrasted to contemporary use of the same methods as a means of discipline. The study's intent, design, and organization are delineated along with the study's specific research questions.

³³20 U.S.C. § 1412(5)(C); 34 C.F.R. 300.532.

Chapter Two reviewed the related literature. This source of information is reflective of schools, professional groups, attorneys, and parents' experience with the issues addressed in the study. Observations focused on patterns, growth and development in policies related to the issues, and trends established by reported experience during the fourteen years that 94-142 has been maintained as the foremost piece of legislation for the handicapped student.

Chapter Three summarized case law dealing with expulsion of the handicapped by schools. Trends, tests, and procedural assessment by court decree were identified.

Chapter Four looked at policy as it has developed within two school districts from the 5th and 7th circuits. Particular attention was given to the historical growth and development of these policies and the underlying influence of litigation on the actual policy development.

Chapter Five analyzed the data collected in chapters two, three, and four as a basis for addressing the research questions established.

Chapter Six provided suggested recommendations and criteria to be utilized by school districts for policy development using the historical foundation developed and research questions addressed by this study.

Chapter II

RELATED LITERATURE AND RESEARCH

Introduction

The significance of rules and laws and their value to those to which they apply are often reflected in the writing and research by those who must deal directly with them over time. Local school systems typically reflect a value structure of our society. Thus their responsibility is to provide a system for education of the young people to carry on and perpetuate what is considered acceptable. Abraham Lincoln said, "A child is a person who is going to carry on what you have started." An old Chinese proverb speaks to this same issue, "If you want to plan for a year, grow rice; if you want to plan for a decade, plant a tree; if you want to plan for a lifetime, educate a child." Horace Mann believed that every person has a natural law right to an education.¹ This process of education requires structure. Rules are established to maintain the process and enforcement becomes as important as the process since it enables all to equally access the opportunity without discrimination on the basis of standards which have evolved

¹Horace Mann, "Tenth Annual Report to Massachusetts State Board of Education," Old South Leaflets (1846), 177.

over time including race, creed, national origin, sex, or handicap. The standard environment needed to achieve this opportunity must be free from disruption which would interfere with a student's right to learn and a teacher's right to teach. Established and promoted for the good of all, rules, regulations, order, and discipline must apply to all who become part of the process.

Impact of Public Law 94-142

The most far-reaching, extensive set of rules and regulations affecting handicapped children were those developed to implement Public Law 94-142. One of the major impacts of P.L. 94-142 was requiring that children with handicaps be educated in the regular school with non-handicapped to the greatest extent possible. This concept is referred to as LRE--least restrictive environment. Federal funds accompanied the enactment of the law but were withheld from several states in 1979 because of continued use of segregated facilities.² As the trend continued to integrate handicapped children, discipline became more of an issue because of behavior as a result of the handicap, inexperience on the part of school staff to manage these differences, and adjustment between and among peers.³

²Clairborne R. Winborne and George H. Steinback, "The New Discipline Dilemma, Educational Forum, Summer 1983, 435.

³Ibid., 436.

The sense of guilt and obligation that existed as a result of having handicapped out of school is better understood with an awareness of the situation that once existed prior to 94-142 being passed. One million seven hundred and fifty thousand handicapped students were receiving no educational services and 2.5 million were reported as having inadequate services prior to the 1970s.⁴

Schoof attributed the Elementary and Secondary Act (ESEA) in 1965 as the foundation for free and appropriate education for the handicapped. He also viewed this act as the means to identify and keep handicapped students in school as well as a means to avoid the many strategies previously employed by schools to justify their removal to avoid disruption for the masses.⁵

Thus, the intent of PL 94-142 in 1975 represented an announcement of a national policy advocating an appropriate education for all handicapped children to ensure maximum benefits to handicapped children and their families.⁶

Typically, disciplinary policy framework established by school systems revolve around the protection of individual rights and mandatory enforcement by all employees to prohibit and prevent types of student conduct that becomes

⁴Senate Report no. 168, 94th Cong. 1st Session, 8.

⁵A. Schoof, "The Application of 94-142 to the Suspension and Expulsion of Handicapped Children," 24, Ariz. L.Rev. (1982) 685.

⁶Ibid., Senate Report no. 168, 6.

dangerous, disruptive, or destructive which could destroy the functioning and safety of the school program. Codes of conduct are routinely established by boards of education to clearly spell out the expectations and responsibilities established to maintain and perpetuate the school program. This requirement exists with respect to the rights that students maintain as citizens under the Constitution of the United States. These rights cannot be abridged except in accordance with the due process of law. The constitutional basis supporting this right was established in 1868 with the ratification on July 9th of the Fourteenth Amendment's equal protection and due process clauses which states:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.⁷

The procedure for ensuring provision of due process prior to taking away a student's right to education is a key component of any code of conduct and board of education policy associated with suspension and expulsion.

In 1975, the top concern assessed by Gallup's annual public school poll was lack of discipline.⁸ Additionally, the debate in the Senate relative to P.L. 94-142 contained

⁷United States Constitution, amendment XIV, section 1.

⁸G. Gallup, "Eighth Annual Poll of Public's Attitudes Toward Education," Phi Delta Kappan, (April 1975), 237.

horror stories about disruptive, violent behavior and the devastating impact such behavior had on the classroom.⁹ Surprisingly, no comments were received from the public input sessions related to disciplinary exclusion from the over 1600 written comments received in reaction to the proposed rules for PL 94-142.¹⁰ However, comments related somewhat to this area addressed the "stay put" provision of the Act which covers the time between when a child's placement is considered to be changed for a number of reasons and the time such change is actually implemented. This provision of the Act is described within the context of due process hearing and right to litigation and reads "the child shall remain in the then current educational placement of such child, unless the parents and school officials otherwise agree."¹¹ HEW's response to these comments resulted in the only area of the regulations that is related to discipline. A comment was added related to the "stay put" rule:

Comment: This section does not permit a child's placement to be changed during a complaint proceeding, unless the parents and the agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with

⁹U.S. Committee on the Judiciary, 1975.

¹⁰Federal Register, vol. 42, p.42474.

¹¹20 U.S.C. § 1415, p.3.

children who are endangering themselves or others.¹²

The right to an education has previously been noted under the Brown decision as an essential civil right of every citizen. The dialogue contained in that decision clearly defines the context within which it becomes necessary to view the value of education:

Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms.¹³

Turnbull analyzed the initial implementation of PL 94-142 and found that the application of school discipline codes to handicapped children posed one of the most difficult issues generated by the landmark legislation due to the statute nor regulations addressing suspension and expulsion directly.¹⁴

¹²34 C.F.R. 300.513.

¹³Brown v. Bd of Ed, 347 U.S. 483(1954), 493.

¹⁴H.R. Turnbull and A.P. Turnbull, Free Appropriate Public Education: Law and Implementation, Love Publishing Co., 1979, 15.

Leone felt that before the passage of 94-142, many BD, EMH, LD, and other handicapped children exhibiting behavior and/or discipline problems dropped out or were "pushed out" as a result of relatively few programs for secondary students and the schools inability to handle these problems.¹⁵

Problems maintaining order in schools continued in 1984 to be a source of public concern.¹⁶ Discipline, as perceived by the general public, remains as one of the biggest problems facing schools.¹⁷

Simon feels the extent of educational services required during an expulsion is unclear but that if alternatives available were more adequate, appropriate settings may be forced upon parent and student while eliminating total exclusion.¹⁸

¹⁵Peter E. Leone, "Suspension and Expulsion of Handicapped Pupils," The Journal of Special Education, Vol. 19, no. 1, 1985, 112.

¹⁶G.H. Gallup, "The 16th Annual Gallup Poll of the Public's Attitudes Towards the Public Schools," 62, Phi Delta Kappan, 670-671.

¹⁷Gallup and Clark, "The 19th Annual Gallup Poll of the Public's Attitudes Toward Public Schools," 69, Phi Delta Kappan, (1987), 17.

¹⁸Sue Simon, "Discipline in the Public Schools: A Dual Standard for Handicapped and Nonhandicapped Students?" Journal of Law and Education, Vol. 13, no. 2, 224.

Similarly, Sindelar feels mandatory testing of all handicapped students facing disciplinary exclusion would probably uncover previously undetected handicaps.¹⁹

P.L. 94-142 Issues Challenging Traditional Discipline

P.L. 94-142 was the second major challenge to the use of suspension and expulsion for handicapped students as a means of excluding children with handicaps from school. It was interesting to note, however, that suspension and expulsion were not mentioned in the act or regulations. Discipline was only mentioned once, and then in broad terms.

The Children's Defense Fund, a powerful national advocacy agency, states its position very clearly on the issue of expulsion of children with handicaps:

Issue:

Is it permissible under PL 94-142 for school districts to expel handicapped students?

Conclusion:

There is no debate that when the challenged behavior is linked to the child's handicap, expulsion is clearly impermissible. A review of the statutory language, its underlying policies, the legislative history, and the relevant case law reveals a consistent position that expulsion of a handicapped child is inappropriate under any circumstances.²⁰

¹⁹K. Sindelar, "Disciplinary Exclusion of Handicapped Students: An Examination of the Limitations Imposed by the Education of All Handicapped Childrens Act of 1975," 51 Fordham L.Rev.(1982), 168.

²⁰Memorandum from the Children's Defense Fund, Expulsions Under 94-142, (Washington, D.C.:Childrens' Defense Fund, February 15, 1980), 1.

There is no clear cut delineation of policy requirements for suspension and expulsion but the implication is strengthened from the requirement that all handicapped children must be identified and receive a free appropriate education. If a student is expelled for the rest of the year or one year maximum, this condition of all handicapped children receiving a free appropriate education would appear not to be met; therefore, the required assurances cannot be met. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.²¹

The importance of decorum in the schools as a necessary prerequisite for providing education can conflict with state statutes concerning compulsory attendance. Reutter addresses this issue in the following statement:

Since expulsion of a child from school immediately brings up issues concerning his statutory right to attend school, which is a valuable legal right, courts examine the reasons for suspensions and expulsions. Uniformly, however, they recognize that the right of a child to attend school is conditioned upon his presence not being detrimental to the health, morals, or educational progress of other pupils.²²

A multitude of issues becomes involved when consideration is given to application of routine

²¹34 CFR 300.513 (comment).

²²Edmund E. Reutter, Jr., Schools and the Law, (New York: Oceana Publications, Inc., 1960), p.114.

disciplinary procedures to handicapped children. Drop out rates are continuing to soar; suspension of high school students continues to increase; high schools are faced with tremendous pressure to keep the school environment free from drugs, gangs, alcohol, violence, and disease. The emphasis in special education is to educate the handicapped with regular education to the greatest extent possible (least restrictive environment). A new movement, entitled the "Regular Education Initiative" attempts to do just this with emphasis on keeping the students out of special education. The Illinois Administrative Code Section 226 provides that everything that is available to regular students must be made available to handicapped students.²³ One may conclude that equality is the goal. The original intent of P.L.94-142 was to make opportunity available for all handicapped children to receive a free and appropriate education.

The policy study and recommendations made by the Council for Exceptional Children in 1977 reflected a void of any policy addressing expulsion. However, these initial policies included recommendations for interim services in the event of suspension. A special note at the conclusion of the disciplinary section prepared by CEC defines the perspective and fear of that agency:

²³Section 226.40 Rights of Children Requiring Special Education--Exclusion, Suspension: The local school district shall be responsible for ensuring that those children who require special education services enjoy rights and privileges equal to those of all other children.

Caution must be exercised; for years, handicapped have been suspended from school as a means of "getting rid" of students and placing them at home with no special education or related services provided other than a home tutor for a minimal amount of time each day.²⁴

Lichtenstein surveyed all state departments of education and found them all to have suspension and expulsion policies clearly providing authority to principals and school boards to suspend and expel students. However, of the fifteen departments responding to the question regarding if a policy or special provision for special education students existed, only three indicated that such a policy or provision existed.²⁵

Confrontational disciplinary issues, therefore, address the very heart of the legislation designed to protect the handicapped while challenging the right to disrupt the regular education for the masses.

Flygare, Director of Legal Affairs for University Systems of New Hampshire, reacted to *S-1 v. Turlington* and the slow development of recommended action from legal precedent. He recommended use of suspension immediately for those students posing a danger to themselves and others without a preliminary hearing. Secondly, he considered use

²⁴Council for Exceptional Children, Disciplinary Action Section (Policy #300, in Special Education Administrative Policies for State and Local Education Agencies, Reston, Virginia, 1977, p.7.

²⁵E. Lichtenstein, "Suspension, Expulsion and the Special Education Student," Phi Delta Kappan, 61, no. 7 (March 1980): 459,460.

of suspension for periods of up to ten days as appropriate but consideration of the relationship between the disruptive behavior and handicapping condition is recommended. And finally, he believed expulsion could be used with the handicapped but all services to the student should not cease.²⁶

In 1982, Evans surveyed cities of 100,000 or more to investigate the prevalence of major school systems that suspend and/or expel handicapped students and assess the effectiveness of those disciplinary procedures. One hundred and eight of 153 surveys responded with only three indicating that neither suspension or expulsion were used with handicapped students.²⁷ Sixty-six districts indicated that they did not expel students with handicaps. The forty-one that did expel or have policies allowing for expulsion indicated that their policies were in accordance with the "due process" requirements of PL 94-142.²⁸ Interestingly, only thirteen of those indicating that they do expel also indicated that an attempt is made to determine any relationship between the behavior and the handicapping condition.

²⁶Thomas J. Flygare, "Disciplining Special Education Students," Phi Delta Kappan, May 1981. p.670-671.

²⁷Robert J. Evans, "Suspension and Expulsion of Handicapped Students: Prevalence in Major U.S. Cities," Unpublished research report, 1982. ERIC, ED 234579. 5.

²⁸Ibid., 7.

Mazzarella included suspension/expulsion of handicapped students as one of several issues facing school principals which may lead to suits and litigation against them as both a school representative and individually. She shows how attention should be given to liability of school administrators under what was originally known as the "Ku Klux Klan Act."²⁹ This statute, Section 1983 of the Civil Rights Act of 1871, was originally passed as a reaction to mistreatment of blacks following the Civil War and permits any person whose constitutional rights have been violated to sue for damages.³⁰ She references a study by McCabe³¹ which points out that strict judicial interpretation of this Act in earlier decades resulted in 280 suits filed under all sections prior to 1960. By 1972 broader interpretations by the courts and increased interest in civil rights generated a total of approximately 13,000 suits under Section 1983. As of 1982, 13,000 suits were being filed annually under this section!³² Particularly interesting is that this article predicted that the possibility of collecting attorney fees would make Section 1983 suits much more

²⁹JoAnn Mazzarella, "Self Defense for Principals: On Staying Out of Court, Part Two," Principal, January 1983, 11.

³⁰Ibid., 11.

³¹Nelda H. Cambron-McCabe, "School District Liability under Section 1983 for Violations of Federal Rights," NOLPE School Law Journal, 10 (1982): 99-108.

³²Ibid., 107,108.

likely. Avoiding the denial of due process rights appeared to be the major preventative suggestion by the author. The Exceptional Children's Protection act was passed in 1986 and permits payment of attorney fees. Sindelar similarly cautioned school board members and administrators about their liability resulting from following and/or practicing illegal procedures in excluding a handicapped child from school.³³ Conclusions drawn suggest working on good self defense practices of a preventative nature by having good knowledge of school law, a good liability policy, and determination to uphold the rights of students.³⁴ Cambron-McCabe also emphasize that liability never results from the provision of too much due process.³⁵

Craft and Hasussman reviewed the legal background of suspension and expulsion as they pertained to the handicapped along with guidelines established by landmark court cases covering the issue. They concluded that consistent guidelines at the federal level continue to await interpretive regulations or additional significant court decisions to address the following issues:

³³Karen Sindelar, "Suspensions and Expulsions of Handicapped Students: The Evolving Case Law," School Law Bulletin, 12 (July 1981): 1-9.

³⁴Mazzarella, "Self Defense," 15.

³⁵Cambron-McCabe, "School Liability," 291.

1. The length of an emergency suspension for dangerous behavior before it is considered a change of placement.
2. Whether numerous suspensions may be imposed on the same student.
3. The extent of a school district's responsibility to the handicapped student whose misbehavior and handicapping condition are unrelated.
4. The extent of a school district's responsibility to the student who has not been conclusively identified as handicapped.³⁶

Leone also saw the major issues identified by the courts in the past seven years as:

1. Is suspension or expulsion of a handicapped pupil a change in educational placement; as such, does it entitle students to the procedural safeguards of PL 94-142?
2. Can a handicapped student be suspended for misbehavior related to a handicapping condition?
3. If misbehavior is related to a handicapping condition, is suspension or expulsion a denial of free appropriate public education guaranteed by P.L. 94-142?³⁷

Leone characterized court cases as instructive because they guide the review of school disciplinary policy, help clarify the relationship between disciplinary problems and handicapping conditions, and assist educators in taking preventive measures to ensure that handicapped children infrequently violate school policy.³⁸ Decisions of courts other than appellate courts are persuasive but are not

³⁶Nikki Craft and Stephan Haussman, "Suspension and Expulsion of Handicapped Individuals," Exceptional Children, 49, no.6(1983), 526.

³⁷Leone, "Suspension,Expulsion," 116.

³⁸Ibid.

binding on other courts. No clear direction or unanimity was seen by Leone from court decisions to date. His summary concluded that schools cannot expel students whose misbehavior is related to their handicapping condition; that appropriately placed handicapped pupils can be expelled the same as other pupils. and paradoxically, that expulsion is an appropriate form of discipline for handicapped pupils but termination of all educational services is not acceptable.³⁹ In Malone⁴⁰, consideration was given to the coverup a board of education could have as a result of their review and determination that the behavior creating the need for expulsion was not related to the handicap; therefore, a team of professionals must be involved. The safety valve of due process which involves use of an independent third party was the next procedural safeguard required. Following all administrative remedies, litigation could be pursued. Full procedural safeguards result in substantial bureaucracy and legal system time requirements. It took eight years of extensive work and commitment of resources to address this issue which ultimately resulted in this last case to be brought before the Supreme Court to reach a final decision.⁴¹

³⁹Ibid., 117.

⁴⁰School Board of Prince William County v. Malone, 762 F.2d 1210 (Virginia, 1985).

⁴¹Honig v. Doe, 108 S.Ct. 592 (California, 1988).

Least Restrictive Environment

The issue of Least Restrictive Environment (LRE) or educating handicapped children with nonhandicapped to the greatest extent possible, becomes central when discussing suspension and expulsion because it removes the student from the environment presumed to be most appropriate prior to the inappropriate behavior.⁴² Johnson captured the significance of LRE:

In essence, this doctrine provides that, when government pursues a legitimate goal that may involve the restricting of fundamental liberty, it must do so using the least restrictive alternative available. Applied to education, courts have ruled in principle that special education systems or practices are inappropriate if they remove children from their expanded peer group without benefit of constitutional safeguards. Placements in special environments for educational purposes can, without appropriate safeguards, become a restriction of fundamental liberties. It is required, then, that substantive efforts be made by educators to maintain handicapped children with their peers in a regular education setting, and that the state (as represented by individual school districts) bear the burden of proof when making placements or when applying treatments which involve partial or complete removal of handicapped children from their normal peers.⁴³

An important issue to address when considering changing a student's program to a more restrictive setting as a result of inappropriate behavior is whether or not the least

⁴²34 C.F.R. 300.550; 20 U.S.C. §§ 1412(5)(B); 1414(a)(1)(C)(iv).

⁴³R.A. Johnson "Renewal of School Placement Systems for the Handicapped." in F.J. Weintraub et al. (eds.) Public Policy and the Education of Exceptional Children. Reston VA: The Council for Exceptional Children, 1976, 17.

restrictive environment requirement is being met. Referred to as LRE, consideration of the benefit for being with non-handicapped children is given to each placement. A useful framework has been established in the Latchman decision.⁴⁴ A three prong test was developed in Latchman which can be used to make effective LRE decisions resulting from inappropriate behavior exhibition while in the previous placement:

1. Can the services which make the placement superior be provided in a non-segregated setting?
2. Are the marginal benefits of mainstreaming far outweighed by the benefits gained from services which could not feasibly be provided in a non-segregated facility/setting?
3. Is the handicapped child a disruptive force in the non-segregated setting outweighing and marginal benefits gained from mainstreaming?⁴⁵

In a follow up to the 1980 public policy paper it was felt by significant policy makers that suspension and expulsion were not prohibited by 94-142--only for those who were disruptive because of their handicap, and expulsion of a child whose handicap causes such behavior violated the

⁴⁴Latchman v. ISBE, 852 F.2d 290 (7thth Cir. 1988).

⁴⁵Ibid., 295.

zero reject rule.⁴⁶ Turnbull's description of the zero reject rule is significant:

Zero reject takes due notice of the historical importance of public education in our society and justly recognizes that failure to educate a handicapped child often leads to enforced and permanent dependency. Such a lack of educational opportunity, and the resultant dependent status of handicapped people will ultimately increase social and economic costs to society through maintenance of handicapped people in segregated facilities and through use of more costly settings and services. The integration of handicapped with nonhandicapped students in public schools enhances the pluralistic underpinning of our society and clearly conveys the message that inclusion of handicapped children in public schools is a right and not a mere privilege.⁴⁷

Expulsion is the most restrictive placement of all because it is functionally "no placement," and therefore violates the LRE principal.⁴⁸

Instructional programs and services for institutional settings are required under 94-142. The consideration of suspension and expulsion within this environment, needless to say, is unique. Warboys and Shauffer review the requirement of the federal law within the correctional institutional setting including consideration of inappropriate behavior typically leading to suspension and/or expulsion in regular education settings. They

⁴⁶H. Rutherford Turnbull, III and Craig Fiedler, "Expulsion and Suspension," Special Education in America: Its Legal and Governmental Foundations, edited by Joseph Ballard, Bruce Ramierz, 1987, 2.

⁴⁷Ibid., 4.

⁴⁸Turnbull, Special Education, 3.

indicate that "no provision in the law permits exclusion of an inmate based on a propensity for violence or based on vulnerability."⁴⁹ While no reference is given, the statement is made that "the Supreme Court suggests that a balancing test of the rights guaranteed by the EHA against institutional security must be used. This is observed by an inmate receiving individual educational instruction in a more restricted area and when provided under these circumstances the reasons must be noted in the IEP.⁵⁰ If the individual is placed out of the mainstream for reasons not related to education, the least restrictive setting requirement is not violated.⁵¹

Keilitz attributes this failure of the schools to work with this identified population as the reason for over representation of handicapped juveniles in detention centers and correctional facilities.⁵²

Dual System of Discipline

Regular education students, when out of line with behavior such that disruption of the educational environment

⁴⁹Loren M. Warboys and Carole B. Shauffer, "Legal Issues in Providing Special Educational Services to Handicapped Inmates," Remedial and Special Education, Vol.7, no. 3, May/June, 1986, 40.

⁵⁰Ibid., 40.

⁵¹Ibid.

⁵²F. Keilitz, "The Handicapped Youthful offender: prevalence and Current Practices," Paper prepared for Corrections/Special Education Training Conference, Arlington, VA., April, 1984, 5.

of others occurs, become subject to discipline on a continuum from mild consequences (detention during or after school and making up work missed) to severe consequences (expulsion--removal from the educational program for up to the remainder of the year and sometimes the entire following year).⁵³ It was often more convenient to remove handicapped students from the social mainstream than integrate them into public schools or to provide them with jobs or training.⁵⁴

The question of a dual disciplinary system and the handicapped being permitted to extend permissiveness and disruptive behavior without usual and customary consequences has many implications for the future. Senator Gramm, in discussing the consequences of our nation's jails being severely overcrowded and the end results of early release, expressed during an interview on "Face the Nation," April 30, 1989, what could be a consequence of what a dual system could be teaching our students at an early age. He reported that "convicted felons are laughing at the courts because they know they won't be punished for crimes they commit.

²³Florida statutes and Rules permit expulsion to run from the remainder of the current year and one additional year. Florida School Laws(1989), sec. 228.041(26), 6.

⁵⁴Burgdorf & Burgdorf, "A History of Unequal Treatment: The Qualifications of Handicapped Persons As A Suspect Class Under the Equal Protection Clause", 15 Santa Clara L.Rev.(1975), 5.

Two thirds are returned to jails for similar problems/offenses."

Claiborne Winborne and George Stainback raised the question, "Should exceptions be made for mainstreamed students when applying rules of discipline?"⁵⁵ Their background study shows the preparedness of the schools to accept the more severely handicapped and previously segregated classes such as emotionally disturbed into the mainstream as the major reason creating the confrontation with regular suspension and expulsion policy apply to handicapped children. Several states resisted and found federal funds held up in 1979 largely due to continued use of segregated public facilities.

Lichtenstein contended that as a result of 94-142, no special education child can be removed from his/her special program for more than two days. To address this apparent dual system, Lichtenstein suggested seven alternatives to administrators:

- (1) Establish a temporary time-out program at either the building level or district level as a temporary measure while seeking ways to return the student to the regular program.
- (2) Create an alternative program that emphasizes behavior modification.
- (3) Develop a half way program for students moving back and forth between regular and special programs

⁵⁵Claiborne Winborne and George Stainback, "Special Education and School Discipline," Small School Forum, 5, no.1 (1983),16.

- (4) Create an in district or intra district program for disruptive students to be assigned after hours
- (5) Maintain disruptive students in a self-contained room and bring the teachers to the room
- (6) Develop a work-study or cooperative education program with the districts service unions to provide learning opportunities for these students
- (7) Develop a procedure where disruptive students are allowed to withdraw from a situation without penalty if they sense a confrontation or problem developing.⁵⁶

Simon and Sindelar illustrated examples of how local schools desire to apply equal discipline to handicapped and nonhandicapped but ending up with being required to have different application, dual systems and ultimate disrespect for discipline because of nonhandicapped students claiming to be handicapped to avoid discipline--especially expulsion.⁵⁷

Cullinan and Epstein saw suspension and expulsion as taking away another aspect of normal school life because of the double standard that is apparent in the area of school discipline. Invariably, when a regular student and a seriously emotionally disturbed student are involved in the same inappropriate behavior, the SED student has a much smaller chance of being excluded from school for the same

⁵⁶Lichtenstein, "Suspension, Expulsion," 460-461.

⁵⁷Simon, "Dual Standard," 225, and K. Sindelar, "School Discipline and the Handicapped Child," 39 Wash & Lee L. Rev. 1453(1982), 1466.

consequence as the regular student.⁵⁸ They also identified significant issues that they feel are extremely important for the growth and treatment of the SED student:

1. Under what circumstances do we want SED students protected from standard school discipline practices?
2. When should they be exposed to normal consequences?
3. What place, if any, does the concept of personal responsibility have in the education of SED students?
4. How is the concept of personal responsibility affected by questions of a misbehavior-handicap relationship?⁵⁹

Due Process

Suspension and expulsion, with due process as a prerequisite, are viewed as legitimate and valuable tools for maintaining order. *Goss v. Lopez* was the first case review challenging prerequisite proceedings and use of expulsion and suspension as appropriate disciplinary measures. The *Goss* Court stated:

Due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him, and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.⁶⁰

⁵⁸Douglas Cullinan and Michael H. Epstein, "Legal Decisions and Appropriate Education of Seriously Emotionally Disturbed (SED) Students," The Journal of Special Education, Vol. 20, no.2, 1986, 269.

⁵⁹*Ibid.*, 271.

⁶⁰*Goss v. Lopez*, 419 U.S. 565(1975), 584.

The Court also noted that more formal procedures may be required for expulsions or longer suspensions.⁶¹

Gary Wayne Shepherd analyzed the application of due process procedures as they applied to handicapped students involved in suspension and expulsion proceedings. He concluded that suspension exceeding ten consecutive days and expulsion of handicapped students triggered procedural safeguards.⁶²

The Office for Civil Rights(OCR) evaluates complaints involving exclusion of students from educational programs using as criteria the effort made toward making the procedural safeguard of due process rights available throughout the process.⁶³ This agency's position on enforcement has been significant since the agency's decisions carry a precedence quality and act as a barometer to other agencies.

The State Department of Education in Kansas inquired about OCR's ruling on cumulative ten day suspensions being considered a significant change in placement and triggering Section 504 Evaluation and Placement Requirements prohibiting the use of in school suspensions for more than

⁶¹Ibid.

⁶²Gary Wayne Shepherd, "Suspension and Expulsion of Handicapped Students in the United States: A Due Process Procedures Model," (Ed.D. dissertation, University of South Dakota, May 1985), 98.

⁶³42 Federal Register, vol.42, p.22690; 45 CFR 84(1983).

ten days in a school year. OCR responded by indicating that in-house suspensions are governed by the same considerations as other suspensions and therefore trigger evaluations and placement safeguards when reached in excess of ten days during a year.⁶⁴

On October 11, 1988, Ms. Johnnie W. Bailey for Greenwood School District #30 in Greenwood, South Carolina requested in writing to OCR a response to her question, "Does the U.S. Department of Education's Office for Civil Rights have written guidelines on how to address discipline needs in an IEP?" OCR replied that there are no IEP disciplinary guidelines from their office because of their belief "that content of IEPs, specifically behavior management goals and objectives, should be prepared by parents and the school district during IEP meetings."⁶⁵

Time beyond ten days is referred to as "long term or indefinite removal" and was considered by Simon as "a cessation of the student's access to educational resources and contravenes the student's right to attend school."⁶⁶

Simon cited the differences between the due process procedures for regular and special education:

Due process of law is the touchstone of expulsion hearing procedures for both handicapped

⁶⁴Education for the Handicapped Law Report, "OCR/Section 504 Letters," Supplement 239, April 21, 1989, 305:44.

⁶⁵Ibid., 305:26.

⁶⁶Simon, "Dual Standard," 221.

and nonhandicapped students, but this objective is achieved in different ways. For example, impartiality is guaranteed in the ordinary case merely by providing neutral school officials as decision-makers, while a handicapped student's hearing is held at the local level before someone who is not a school district employee.⁶⁷

The different hearings also focus on different factors. A nonhandicapped student's hearing emphasizes a factual inquiry to ascertain the existence of misbehavior, mitigating circumstances, if any, and the appropriateness of the expulsion. In a handicapped student's hearing, after misbehavior warranting expulsion is established, the inquiry turns to whether the misbehavior was related to the student's handicap. Aside from the specialized decision maker, this is the crux of the extra procedural protection afforded handicapped students in disciplinary proceedings.⁶⁸

Simon argued that the due process protection for non-handicapped students are sufficient to protect the intent of handicapped students since they were developed to "protect fairness of disciplinary proceedings."⁶⁹

Simon felt PL 94-142 procedures for due process concerning change of placement "point to a different class of interests--appropriate educational services--and were never intended to be used in a disciplinary context."⁷⁰

Despite Simon's position of unifying the disciplinary standards used, she cautioned school administrators:

⁶⁷20 U.S.C. § 1415(b)(E)(2).

⁶⁸Simon, "Dual Standard," 223.

⁶⁹Ibid., 226.

⁷⁰Ibid.

The good faith immunity school officials normally enjoy would not apply when they take disciplinary action against a handicapped student which interferes with the student's education without making a prior determination that the disruptive behavior was not handicap related.⁷¹

Osborne saw the due process requirements established for the handicapped as more stringent and rightfully so to prevent a recurrence of past wrongs against this population.⁷² He also concluded that since the Supreme Court did not differentiate between handicap-related and nonhandicap-related behavior that a handicapped student cannot be expelled under any circumstances.⁷³ While this interpretation was considered by Osborne to be theoretical in origin, he saw it as reality and as having little impact because attorneys have had little difficulty in showing a connection between misconduct and the handicapping condition.⁷⁴ Osborne saw the result of Honig as "striking a delicate balance between the handicapped student's right to receive an appropriate education in the least restrictive environment and the school administrator's need to maintain order and discipline in the school."⁷⁵

⁷¹Ibid., 237.

⁷²Allan G. Osborne, Jr., "Dangerous Handicapped Students Cannot be Excluded from the Public Schools," 46 Ed.Law Rep. 1105 (Aug.4, 1988), 1111.

⁷³Ibid., 1112.

⁷⁴Ibid.

⁷⁵Ibid., 1113.

The Role of the Court

The courts are being asked to rule on cases to determine the balance between the educational rights of handicapped children with the school's needs to maintain order and preserve educational rights of other children. This is not new. In 1893 it was determined by the court that the act of suspension of a handicapped child in Massachusetts because he was "so weak in mind as not to derive any marked benefit from instruction and because he was troublesome to other children making unusual noises, pinching others, etc.," to be a "good faith act aimed at eliminating disruptive students from the school environment."⁷⁶

The reference to the court not wanting to usurp schools authority can also be found in Rowley:

Congress chose to leave the selection of educational policy and methods where they have traditionally resided with state and local school districts.⁷⁷

This reluctance of the court to intervene in the disciplinary process has, as a basis, a recognition of the need by school officials to be vested with ample authority and discretion to deal with this issue as it occurs.⁷⁸ The court has shown a healthy respect for the professional

⁷⁶Watson v. City of Cambridge, 157 Mass. 561.

⁷⁷Board of Education v. Rowley, 102 S.Ct.3034(1982) at 3042.

⁷⁸Stuart v. Nappi 443 F.Supp. 1235(D.Conn.1978),12434.

judgement of school officials.⁷⁹ Fortunately this aspect of "in loco parentis"⁸⁰ is honored. The expectation of maintaining a safe environment is a prerequisite for also maintaining parental, community, and teaching staff support. It is well established that a safe environment is a fundamental expectation that all special education and regular education administrators seek as a prerequisite for having effective schools and programs for children and youth.

Expulsion as a Necessary Disciplinary Tool

Little, if any, consistency exists on this issue. The courts have not ruled consistently in such a manner as to whether a school district can expel a handicapped child. The Council for Exceptional Children(CEC) did not address expulsion in its administrative policy guidelines for state and local educational agencies.⁸¹

Winborne and Stainbach reported that CEC did not consider the expulsion question "as a priority under CEC review."⁸²

⁷⁹D. Lehr and P. Heaubrich, "Legal Precedents for Students With Severe Handicaps," Exceptional Children, Vol.52(1986),52.

⁸⁰159 F.2d 683.

⁸¹Council for Exceptional Children, "Disciplinary Action Section (Policy #300)," Special Education Administrative Policies for State and Local Education Agencies, Reston Va.: CEC, 1977, p.7.

⁸²Winbourne, "Personal Communication," 437.

In December of 1980, the National Center for Law and Education summarized the non-definitive status of federal law related to the handicapped:

The federal laws safeguarding the rights of students with special needs have implications for disciplining students identified as handicapped, those with evaluations or appears pending, and students who may be perceived as handicapped, and in particular, the circumstances under which they can be excluded thought disciplinary suspension or other exclusion.

Suspension and expulsion of handicapped students may be illegal under P.L. 94-142, as well as Section 504 of the Rehabilitation Act of 1973, and may be illegal for students referred for evaluation or perceived to be handicapped on one of the following grounds:

1. The right to a free appropriate public education which includes specially designed instruction to meet the student's individual needs
2. The right to have any change in placement occur only through the prescribed procedures
3. The right to an education in the least restrictive environment with maximum possible interaction with non-handicapped peers
4. The right to continuation of the current educational placement during the pendency of any hearing or appeal or during any proceeding relating to the identification, evaluation, or educational placement of the child or the provision of a free appropriate public expense
5. The right not to be excluded from, denied benefits, aids, or services, or be discriminated against on the basis of one's actual or perceived handicapped status.⁸³

⁸³National Center for Law and Education, Inc. Excerpt from letter of Comment on "Notice of Intent to Develop
(continued...)

A major analysis of federal court decisions and OCR investigation completed in 1982 by Grosenick et al concluded that "(1) it is probable that any permanent exclusion of a handicapped student violates the FAPE requirement, and (2) the procedural safeguards outlined in previous case law, which affect all students, in P.L. 94-142 and in Section 504 must be applied to handicapped students in all cases where any type of exclusion, emergency or otherwise, is contemplated."⁸⁴ Their final conclusion states emphatically that a need exists for school districts to establish a dual disciplinary system--one for handicapped and one for non-handicapped--based on their analysis of all court decisions and interpretations by OCR as of 1982.

Ken Reese found from his analysis of the legal restraints on the disciplinary exclusions of handicapped students for Georgia public schools that neither section 504, P.L. 94-142, nor their implementing regulations specifically prohibit or restrict the use of suspension and expulsion by Georgia school officials in disciplining

⁸³(...continued)

Regulations, Interpretative Rules or Policy Statements." Cambridge, Ma. 1980, 6.

⁸⁴ Judith Grosenick, Sharon Huntze, Beverly Kochan, Reece Peterson, C. Stuart Robertshaw, and Frank Wood, "Disciplinary Exclusion of Seriously Emotionally Disturbed Children for Public Schools," Monograph 7, (March, 1982), 22.

handicapped students.⁸⁵ There is, however, a significant impact on the disciplinary procedures of the Georgia Public Schools as a result of the implementing regulations and judicial classification of long-term suspension and implementation as a change in placement which triggers procedural safeguards.⁸⁶

Handicapped students' right to educational programs and services is clearly established in statutory law, but there are no statutorily established legal conditions upon which that entitlement may be forfeited for misconduct. With no clear guidelines established in statute or regulation, administrators have relied heavily on court interpretation. The court acknowledges the same disposition of having no guidance.

Leone provided a systematic process for the responsibility of determining relatedness of the handicapping condition to the behavior which is quite simple but comprehensive. The steps include:

A Review of the Academic and Disciplinary Record

A review should involve an examination of file documents, including the child's response to previous disciplinary action, and discussion with the child's current and previous teachers. Trends and patterns provide useful information in making

⁸⁵Kenneth Michael Reese, "Legal Restraints on the Disciplinary Exclusion of Handicapped Students from Georgia Public Schools: A Legal Analysis," (Ph.D. dissertation, Georgia State University, 1986), 82.

⁸⁶Ibid., 83.

a decision. Steady, albeit slow, academic progress for several years followed by little or no academic growth and accompanying behavioral problems may suggest a relationship between misbehavior and a handicapping condition.

Similarly, a pattern of misbehavior that indicates a lack of judgment and deficient social skills over time may also suggest a relationship between misconduct and a handicapping condition.

Serious acts of misbehavior, atypical for a particular child, and unaccompanied by changes in placement or academic progress, may suggest no relationship between a specific child's handicap and misbehavior.

Dreikur's model of goal disclosure in which the adult discusses possible reasons for aberrant acts with the student can provide valuable insight into the child's understanding of the problem. Acts defined as malicious or revengeful by school authorities may be misdirected attention-getting behaviors exhibited by youngsters with poorly developed social skills.

Independently evaluate each incident--stay away from unilateral decisions based on the child's disability or handicapping label.⁸⁷

This close association between the handicapping label and misbehavior resulted in exclusion and/or miseducation of millions of handicapped children from our nation's schools.⁸⁸

Osborne maintained that the decision by the Supreme Court in *Honig v. Doe* upheld the Ninth Circuit Court of Appeals decision in *Doe v. Maher* which prohibits handicapped students from being expelled for disciplinary reasons.⁸⁹

⁸⁷Leone, "Suspension and Expulsion," 118-119.

⁸⁸U.S. Code Cong. and Ad. News 1431(1975).

⁸⁹Osborne, "Dangerous Handicapped," 1105.

The presumption exists in favor of the current placement under EHAC and can only be overcome by applying approved rules and regulations which allow for change and or demonstration that the current placement is not appropriate. In many cases, this same requirement is met to show that the child may also be a danger to himself and/or others.

Regulation Revisions Attempted

In 1981, the new Reagan Administration sought to halt the evolution of federal policy for exceptional children along with state and local governments in three directions:

- (1) Reduction in levels of funding
- (2) Reduction or elimination of federal or state mandates
- (3) Elimination of categorical funding in favor of more open-ended support through block grants⁹⁰

This effort was initiated in 1982 by the federal government to remove or diminish rules covering many aspects of 94-142 after only five years under the original rules.⁹¹

A total of 290 court cases concerning discipline and related issues had occurred in forty-six states within the five year period since the rules were adopted.⁹² The

⁹⁰Frederick J. Weintraub and Joseph Ballard, "Introduction: Bridging the Decades," Special Education in America: Its Legal and Governmental Foundations, (Council for Exceptional Children, Reston, Va. 1982) 5.

⁹¹Federal Register, vol.47, p.33839(August 4, 1982).

⁹²National Association of State Directors of Special Education, Liaison Bulletin, (April 1, 1982), 5.

Department of Education (DOE, formerly included under the Department of Health Education and Welfare) for the first time addressed the issue of discipline and adopted the relatedness consideration developed in *S-1 v. Turlington*.⁹³ The proposed rules directed that consideration be given to the relatedness of the behavior to the student's handicapping condition. If the disruptive behavior was related, the extensive procedural safeguards for change in placement would apply. If there was no relatedness, the school could apply the same disciplinary procedures to the handicapped student as would normally be applied to a regular student. The response to this proposed change and others suggested in the revised rules was dramatic. Some of the changes were withdrawn by DOE.⁹⁴ Finally, as resistance and criticism continued to mount by parents and advocacy groups, the agency withdrew all the proposed rules and announced their plans to issue dates and times for additional proposed rule making at another time.⁹⁵ To date, no notice has been issued.

At the same time in 1982, Illinois began to evaluate its mandates and regulations addressing compliance with federal mandates. In a report "Analysis of Public Comment:

⁹³*S-1 v. Turlington*, 635 F. 2d 342, (1981). Also, *Goss v. Lopez* 419 U.S. 565 and *Stuart v. Nappi* 443 F. Supp. 1235 dramatically influenced changes considered at this time.

⁹⁴48 Federal Register, vol. 48, p.49871.

⁹⁵48 Fed. Reg. p. 17962.

Preliminary Report of Special Education Mandates," the Department of Planning, Research, and Evaluation submitted a 60 page document to the Planning and Policy Committee of the Illinois State Board of Education. The report covered input from public hearings, letters, briefings, and research reports. Suspension and expulsion of the handicapped were issues addressed by this evaluation. Most of the comments received were from administrative personnel and school groups. The following major conclusions were reported back by the special report:⁹⁶

1. Special education students should be treated as nearly like other students as possible, particularly emphasizing due process procedures.
2. "BD and LD" students can get by with unacceptable behavior just because they are handicapped.
3. Two standards--one for regular education students and one for special education pupils exist. Further information is necessary for a consistent policy.
4. The present situation is clearly reverse discrimination. It is almost impossible to suspend a special education student who exhibits the same behavioral traits that would cause a normal (regular education) student to be suspended.

The report summary comment read "On this issue--suspension and expulsion--there are rights given to the handicapped child that are not given to other children. The

⁹⁶Department of Planning, Research, and Evaluation. Analysis of Public Comment: Preliminary Report of Special Education Mandates, (Illinois State Board of Education, Nov. 1982), 10.

different application and interpretation is viewed as a concern."⁹⁷ There was no basic disagreement with the report finding. As of today, no changes were made by the state agency on these issues. When contacted in June of 1989 the agency explained that preparation of proposed changes were currently being developed and were anticipated to be made available for public comment in the fall of 1989.

Congress, in preparation for reauthorization of EHA, authorized the General Accounting Office (GAO) in 1988 to study the relationship between the two major federal programs--Chapter 1 Handicapped and the Education of the Handicapped Act--and recommend legislative changes where appropriate. Chapter 1 Handicapped (also referred to as 89-313), originally established under Title I in 1965, was intended to serve only the severe and profoundly handicapped. A major recommendation from this report was to merge the two programs and revise the rules and regulations.⁹⁸ Since Chapter I Handicapped focuses on the severe and profound and the funding mechanism recommended continues to be separate and more substantial, we may see the introduction and input from the field in the disciplinary area and activities of suspension and expulsion.

⁹⁷Ibid., 51.

⁹⁸National Association of Directors of Special Education, "GAO Report on Chapter I," June 30, 1989, 50.

A technical assistance manual prepared under the direction of the Office of Special Education Programs (OSEP) views suspension and expulsion as extreme alternatives on a continuum of disciplinary options.⁹⁹ This guide was one product of SRI's International's Longitudinal Implementation Study of 94-142 funded by Special Education Programs (SEP) in the U.S. Department of Education which addressed two questions: What are the legal issues and what local policies and practices are currently being used? This guide and implementation study was published at the same time as the federal government proposed changes in the federal regulations related to discipline of the handicap. The proposed change was cited in this guide as well as taken directly from the federal register:

Disciplinary rules and procedures (S300.114). Handicapped children are subject to a public agency's normal disciplinary standards and, with limited modifications, to the agency's normal disciplinary procedures. In particular, a public agency may not impose on a handicapped child a disciplinary sanction that requires a hearing by law or agency policy before determining that the child's behavior was not caused by the child's handicapping condition. An agency is permitted the flexibility to address the sensitive question of the relationship between the handicapping condition and the behavior in either its normal hearing or a separate proceeding. It may also address this question before, at, or after the normal hearing, as the behaviors associated with

⁹⁹John D. Cressey, "Suspension and Expulsion in Special Education: A Technical Assistance Guide," SRI International, Nov 1982, paper prepared for Special Education Programs (ED/OSERS), Washington, DC. Division of Educational Services, 1.

the child's handicapping condition must be involved in the determination.

The proposed regulations also make it clear that disciplinary standards and procedures must be applied in a way that does not discriminate against handicapped children and that nothing in the proposed regulations is intended to affect any additional due process requirements imposed by federal or state law regarding disciplinary procedures. The purpose of these changes is to resolve the recurring question of the relationship between the requirements of a free appropriate public education and a school's ordinary disciplinary procedures. The regulations seek to ensure that (1) handicapped children are not subjected to the more serious school disciplinary sanctions for behavior caused by their handicapping condition, (2) handicapped children are otherwise subject to the same disciplinary rules and procedures as are nonhandicapped children, and (3) for relatively minor disciplinary sanctions, flexible and informal procedures may be used for handicapped and nonhandicapped children alike.¹⁰⁰

A variety of procedures and practices were reported from this study including status quo (same discipline code as for nonhandicapped), slight bending of the rules particularly for special students in self-contained programs, reverting to modifications within the special programs and other school discipline alternatives before referral for suspension or expulsion, and special arrangements made with administration and teachers to handle discipline within the special education area. Policy and procedures reported were strongly influenced by recent court cases and were reported to address the following questions:

¹⁰⁰"Summary of Proposed Regulations," Federal Register, vol.47, p.33839(August 4, 1982).

- Does suspension or expulsion raise a change-in-placement issue?
- Does the misconduct relate to the child's handicap?
- Are the recommended placement and IEP appropriate?
- What strategies can be used to avoid suspension and expulsion?¹⁰¹

Barnette and Parker surveyed state education agencies in 1981 to determine the legal status of suspension and expulsion practices applied to emotionally disturbed and behavioral disordered students.¹⁰² Twenty-six of the fifty states responded with nine indicating special procedures for BD/ED. Those not having special procedures for BD/ED indicated that one policy was inclusive for all.¹⁰³ These procedures were found to be in compliance with 94-142 in that they insured that students were not excluded from the opportunity for a free and appropriate education. The special provisions made for BD/ED allowed for disciplinary action to be included in the IEP for those behaviors specifically related to the handicapping condition.¹⁰⁴ Their overall conclusion from this survey and policy analysis concluded that the more handicapped the child the

¹⁰¹Ibid., 8, 9.

¹⁰²Sharon Mildren Barnette and Linda Goodsey Parker, "Suspension and Expulsion of the Emotionally Handicapped: Issues and Practices," 7, #3, Behavioral Disorders (May 1982), 174.

¹⁰³Ibid., 175.

¹⁰⁴Ibid., 176.

greater the need for special education and the right to special handling under direction of the state. This was found to be especially true in the areas covering or designated as emotionally disturbed and/or behavioral disordered.¹⁰⁵ Other key points summarized in the survey included the trend of schools to modify instruction and develop programs for students with behavior problems; behavior problems have been forced on schools with no modifications allowed in the disciplinary codes already established or modified by court action; existing disciplinary strategies are not suitable for the emotionally disturbed/behavioral disordered student; more concern about appropriateness of placement, thoroughness of the IEP, expulsion interpreted broadly by districts as a result of court rulings as a change of placement requiring parent consent and changes sanctioned by the IEP team, the presence of previously planned disciplinary procedures, and the educational process seen as a joint endeavor between parents and school and for which no one person can be solely responsible.¹⁰⁶

In reaction to the continual question raised by school district and state officials to the question of the relationship between the requirement of a free appropriate public education and a school's ordinary disciplinary

¹⁰⁵Ibid., 178.

¹⁰⁶Ibid.

procedures, the Education Department proposed the following amendments to address the issue:¹⁰⁷

(a) A policy which ensures that all handicapped students have the right to a free appropriate public education, as required by sec.300.110 is not violated by disciplinary procedures described in this section. However, nothing in this section may be read to affect any additional due process requirements imposed by disciplinary procedures.

(b) A public agency may use imposition procedures applicable to nonhandicapped children for the imposition of a disciplinary sanction on a handicapped child where a hearing is not required by law or agency policy.

(c)(1) Before imposing a disciplinary sanction on a handicapped child where a hearing is required by law or agency policy, the agency shall determine, in accordance with procedures the agency considers appropriate, whether the child's behavior was caused by the child's handicapping condition. The agency may make this determination before, at, or after the hearing required by law or agency policy. In making this determination, the agency shall involve persons who are familiar with the child and with the behaviors associated with the handicapping condition.

(c)(2) If the agency determines that the child's behavior was caused by the child's handicapping condition, the procedural safeguards in sec. 300.15-300.154 apply to any agency action described in sec. 300.145(a) regarding the child.

(c)(3) If the agency determines that the child's behavior was not caused by the child's handicapping condition, the agency may impose a disciplinary sanction on the child using procedures applicable to nonhandicapped children.

(d) The agency shall ensure that its disciplinary standards and procedures are applied in a way that does not discriminate against handicapped children.

Hockstaff felt that these proposed amendments would have created more problems than they solved because of the

¹⁰⁷Federal Register, Vol. 47, No. 150.

burden and difficult task to determine the relationship between the child's handicapping condition and the behavior.¹⁰⁸ He based this presumption on the fact that Oregon regulations identify a child as "seriously emotionally disturbed" on the following definition:

An emotional problem which affects a child's educational performance to the extent that the child cannot make satisfactory progress in the regular school. The seriously emotionally disturbed child exhibits one or more of the following characteristics over an extended period of time and to a marked degree.

(A) An inability to learn at a rate commensurate with the child's intellectual, sensory-motor, and physical development;

(B) An inability to establish or maintain satisfactory interpersonal relationships with peers, parents or teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A variety of excessive behaviors ranging from hyperactive, impulsive responses to depression and withdrawal; or

(E) A tendency to develop physical symptoms, pains, or fears associated with personal, social, or school problems.¹⁰⁹

Hockstaff conducted two significant interviews in preparation of his paper which exemplify the conditions of the time in school districts as they attempted to work with the issue. He spoke with an advocacy agency and the

¹⁰⁸Jim Hockstaff, "Disciplining Handicapped Students," OSSC Bulletin, Nov. 83, 19.

¹⁰⁹Ibid., 21.

assistant state's attorney who used to consult the Oregon State Board of Education. First the advocate:

An LD child who was mainstreamed except for one period in the resource room was suspended for smoking pot on the school grounds, or being with kids who were smoking pot. The school suspended him and requested an expulsion hearing. The parents contacted us (ODDAC) and I called the school principal. I asked him if he had followed the procedures required for the discipline of handicapped students. He replied, "(The child's) handicapping condition doesn't have anything to do with his behavior, and I have already decided that." I told him that it was a decision not to be made unilaterally by him but by a team of people. He replied, "No problem." He asked me who should be there and so forth. He called the meeting; he had the parents and the school counselor there, but he did not have the special education teacher there. That was it. The counselor said, "Obviously it's not related," and they scheduled the expulsion hearing for the next day. I contacted the school's attorney. His reaction was the same misconception--that because the child is not emotionally disturbed, there is probably no relationship.¹¹⁰

Judith Tegger, Oregon assistant state's attorney:

I was hearing from school administrators, "Does this mean that if kids are identified as handicapped that we have to let them run wild?" What the law says is that if a child who is identified as handicapped is having behavioral problems, you have to determine if there is a connection between the behavior and the handicapping condition and then do something appropriate.... When I taught workshops on this topic I would ask them what they would do with a perfectly normal child. a seventh grade boy who writes uncomplimentary remarks about a teacher on the lockers with spray paint. Would you call the parents? Would you look at how the child is doing in school generally? If it reflected a lot of anger, bitterness, and frustration, and he's flunking a lot of classes, would you consider what to do about fixing up his school program?

¹¹⁰Ibid., 24.

What you would have to do about handicapped kids is not terribly different, but you have to be more explicit about it and make a paper trail. In fact, what you need to do is to evaluate the relationship and the rules that go along with that; involve the parents; do some planning of a problem that takes in all the needs of the child, not just the isolated incident.... I personally think that's the way that good discipline programs are run. Discipline is not whacking a kid over the ear. Discipline is saying to the child "You've got a problem with your behavior." In the whole context we want to help him learn how to do things in a way that will teach him to get along OK in society. And that's true for a handicapped or a nonhandicapped child.¹¹¹

Cole supported this point of view based on analysis of culpable behavior and its relationship to the student's handicap.¹¹²

Office for Civil Rights Criteria and Rulings

Initially, OCR's enforcement rulings interpreted long-term suspensions and expulsions as changes in placement which triggered the procedural safeguards of section 504 and P.L. 94-142. OCR also established decision criteria on the preliminary meeting of the professional staff knowledgeable about the student's handicapping condition as a necessary first step to determine any relationship between the handicap and misconduct of the handicapped student prior to any formal long term suspension or expulsion. OCR compared the use of standard disciplinary tools used for the nonhandicapped and defined the variation necessary:

¹¹¹Ibid., 27.

¹¹²A. Cole, "Expulsion and Long Term Suspension: Is it Legal?" J.L. & Education, April(1975), 325.

If the process followed includes an MDT (multi-disciplinary IEP team) determination that the action is appropriate and consistent with meeting the student's educational needs, then the provision of 34 C.F.R. 104.33 would appear to be satisfied...The decision should be an education based judgement, not merely an automatically imposed sanction under the general student disciplinary procedures that would apply to non-handicapped students who commit similar offenses.¹¹³

Short term suspensions were not viewed by OCR as creating a change in placement but interpreted serial suspensions as suspect, having the same effect as long-term suspensions, and therefore triggered procedural safeguards.

OCR has since changed its position on serial suspensions and feels that the requirement to have a multidisciplinary staff conference at the end of each ten cumulative day suspension to consider continued eligibility and appropriateness of program is sufficient action on the part of a school district.¹¹⁴ The point is clearly made by this agency that exclusion through use of expulsion (defined as permanent), indefinite suspension, or suspension for more than ten consecutive days is considered a significant change in placement.¹¹⁵ However, it was emphasized that a series of suspensions that are each ten days or fewer in duration

¹¹³Van Vleck, 305 EHLR, (O.C.R. 1986), 28-29.

¹¹⁴LeGree S. Daniels, "Memo on Serial Suspensions and Change of Placement," Washington D.C.: U.S. Department of Education, Office for Civil Rights, October 28, 1988.

¹¹⁵Ibid., 2.

may be considered a significant change in placement but should be reviewed in a multidisciplinary conference.

The importance of treating each case individually was emphasized as repeated action of this nature may have significance of varying degree for different cases. The agency also pointed out that after reevaluation, a procedural safeguard with any change in placement, if no relationship exists between the handicap and the disruptive behavior, a handicapped child could be excluded from school the same as a non-handicapped student.¹¹⁶ Emphasis was added at this point that this position could not be applied in Alabama, Georgia, Florida, Louisiana and Mississippi.¹¹⁷

The position and reasoning taken by this court provides the basis for justifying suspension of limited duration regardless of the relationship between the handicap and inappropriate behavior as long as the discipline is imposed considering the best educational interest of the student.¹¹⁸

The Illinois State Board of Education wanted to extend lengthy hearing and evaluation processes to the student for all disciplinary procedures regardless of the relationship

¹¹⁶Ibid.

¹¹⁷Ibid., 5.

¹¹⁸Faye Hartog-Rapp, "The Legal Standards for Determining the Relationship Between a Child's Handicapping Condition and Misconduct Charged in a School Disciplinary Proceeding," Southern Illinois University Law Journal, 1 (1985): 252.

to the handicap.¹¹⁹ Support for opposition to this procedural nightmare and dual standard was obtained from the *S-1 v. Turlington* decision¹²⁰ and the *Doe v. Koger* decision.¹²¹ The outcome of this State Board of Education decision was the reality based consequence that no immediate discipline could take place since the placement would be stayed pending completion of lengthy hearings, evaluations, and litigation--a clear extension of significant amount of time not permitted others who were not handicapped.

Opposition to Expulsion of the Handicapped

Expulsion of handicapped children was one of eight concerns regarding the denial of a free appropriate public education of handicapped children identified by a U.S. Secretarial Task Force on Equal Educational Opportunity for handicapped children.¹²²

The often cited criteria of establishing a causal relationship between a handicap and disruptive behavior and/or inappropriate placement is questioned by Dagley because the same team has responsibility for both

¹¹⁹Peoria School District 150, 149.

¹²⁰635 F.2d 342, 348.

¹²¹480 F. Supp. 225 (N.D. Ind. 1979).

¹²²Secretarial Task Force on Equal Educational Opportunity for Handicapped Children, Interim Report, Washington DC: Author, 1979 as reported in Jeffrey J. Zettel and Joesph Ballard "The Education for All Handicapped Children Act of 1975(P.L. 94-142): Its History, Origins, and Concepts," Journal of Education, Vol. 161, No.3, Summer 1979, 5-22.

determinations.¹²³ He also questioned the sophistication of current diagnostic skills as being accurate enough to judge the relationship between degrees of behavior and handicapping conditions. Therefore, he concludes that the teams tend to decide with strong influence from the parent-- if the parent would take them to court, then there's a relationship; if the parent wouldn't take them to court, then there's no relationship. For those who claim discrimination between regular and special education, he points out that there's also discrimination within special education itself in determining which handicapping characteristic is not effected compared to what are or what degree of which may be related. His final conclusion finds expulsion as a political issue and tremendous waste of human resources and feels all would be better served by a more intense practice of staff development geared towards managing behavior and controlling disruptive behavior with alternatives.¹²⁴ This would be appropriate if applicable to all and include regular students.

Based on existing litigation which included *Brown v. Bd of Ed, S-1 v. Turlington*, *Goss v. Lopez*, *Wood v. Strickland*, *Stuart v. Nappi*, *Doe v. Koger*, *Kenneth J. v. Kline*, and *Southeast Warren Community School District v. Dept of*

¹²³David L. Dagley, "Some Thoughts on Disciplining the Handicapped," Phi Delta Kappan, June 1982, 697.

¹²⁴Ibid., 697, 701.

Instruction, the authors concluded disciplinary exclusion from school constituted a denial of the right to an education which is subject to procedural safeguards, and an alternative program provided as determined by a professional evaluation team working closely with the parent.¹²⁵

Day to day operations of schools bring about the unusual as well as the routine disciplinary situations which have required revisiting since the passage of P.L. 94-142. For example, a special education student cannot be dropped for non-attendance. This would be considered the same as expulsion.¹²⁶ A learning disabled Peoria Illinois student was the focus of Judge Thomas G. Ebel of the Tenth Judicial Circuit decision to bar State Board action which would create a dual system of administering student discipline for students with handicaps where it is shown that the behavior is not related to their handicapping condition. This decision was issued October 7, 1983. This decision addresses only suspension but provides sound reasoning applicable for all discipline:

Any theory that some harm of the brief interruption of classroom work could outweigh the educational value of suspension here can only be recognized as pure imagination, or a feeble attempt at rationalization of a preconceived notion that handicapped students, whatever the

¹²⁵Ibid.

¹²⁶Ramsey County School District (1981), 3 EHLR 503:304.

degree of handicap, are free of classroom discipline. This is not the law.¹²⁷

Bartlett concludes that "what is clear and not so clear, school officials would be well advised not to consider expulsion a viable solution to a students's discipline problem."¹²⁸

Alternative Methods to Avoid Expulsion of the Handicapped

Tilley, Gross, and Cox cautioned school administrators about using specific court decisions to base their disciplinary policy.¹²⁹ Based on the general interpretation and non-specific guidelines provided in the statutes and existing rules, they recommended schools look at trends and individualize their policies. They indicated an appreciation for the flexibility provided as a result of the looseness of the requirements surrounding suspension and expulsion yet felt that apprehension and caution by all is needed to ensure that all rights of the handicapped are respected and not violated. They focused on the primary importance of relatedness of the behavior and handicapping

¹²⁷Peoria School District 150 v. Illinois State Board of Education, 531 F. Supp. 148, at 151.

¹²⁸Larry Bartlett, "Disciplining Handicapped Students: Legal Issues in Light of Honig v. Doe," Exceptional Children, Vol.55, no.4(1989), 365.

¹²⁹Margaret M. Noel, ed. and Norris G. Haring, ed., Progress or Change: Issues in Educating the Emotionally Disturbed, vol. 1, Identification and Program Planning, (Washington University, 1982, Seattle), Bill K. Tilley, Jerry C. Gross, and Linda S. Cox, "Administrative Issues in Educating Emotionally Disturbed Students in Public Schools," 155.

condition as being the key factor in all policy development. Coupled with a low tolerance in schools and the general public for acting out aggressive students, these authors concluded that it is almost if not totally impossible to consider suspension or expulsion as a disciplinary tool for the emotionally disturbed, and if used, concluded that it is a change of placement.¹³⁰ They advocated using the IEP for recording all consequences and punishments for misconduct to insure that procedures are outlined in advance and known by everyone to protect all parties.

In a challenging position paper prepared by Sandra Stone the author looked seriously at the question being asked by many after the implementation of 94-142, "Do the problems outweigh the benefits?"¹³¹ Problems in areas of related services, least restrictive environment, discipline, rural areas, and financial problems were reviewed along with strategies of several states to show the diversity of attempts to deal with the problem of suspension and expulsion. Arizona was reported as encouraging behavior modification; Kansas asked for rulings from the Department of Education; North Carolina provided services if suspension is more than 10 days; Nevada allowed short term suspension if others are endangered; Oklahoma urged careful

¹³⁰EHLR, vol I-III, 551:211.

¹³¹Sandra Stone, "PL 94-142: Do the Problems Outweigh the Benefits", (New Mexico, Position paper unpublished, April, 1983), 1, ERIC, ED 232 423.

documentation; and the District of Columbia allowed no suspension and expulsion. It was concluded as a result of the survey that all states would be less liable if they explored the appropriateness of the placement and worked to modify or change the placement. It was pointed out that this would not always provide a solution as one might think due to the power of the parent to agree or disagree and initiate due process. Some alternate programs suggested (because they seem to be catching on and being used for regular students more and more) included time out programs, alternative behavior modification programs, half way programs between special education and mainstreaming, self contained rooms with rotating teachers, work study programs, and rooms staffed with counselors where a student could go to avoid confrontation yet deal directly with the problem. A special note was made that home instruction and corporal punishment were inappropriate because of the demeaning, anti-self esteem orientation of both.¹³²

Compensatory education has served as a threat and consequence of not providing services or for providing inappropriate services according to Smith and Barresi.¹³³

¹³²Ibid., 16, 17.

¹³³Barbara J. Smith and Josephine G. Barresi, "Interpreting the Rights of Exceptional Citizens Through Judicial Action," Chapter 6, p.68 in F.J. Wintraub et al.(Eds.) Public Policy and the Education of The Education of Exceptional Children, Reston VA: The Council for Exceptional Children, 1976.

They framed three questions raised by the courts to be addressed regarding suspension and expulsions:

- (1) Does suspension and expulsion deny the student of a right to education?
- (2) Does such action constitute a change of placement under 94-142 and 504 and thus become subject to procedural safeguards covering IEP revisions, due process, and least restrictive provisions?
- (3) Do alternative programs need to be provided during the period of exclusion?¹³⁴

Ludlow illustrated the variety of applications of discipline within a high school setting by profiling individual LD, EMH, and BD students in situational behavior common to high school students.¹³⁵ While these examples seemed absurd, inconsistent, and discriminatory, and while this cross section of reality was a good example of what can and actually does go on today in schools, the 10 suggestions given as guidelines for administrators represented a potpourri of the disposition of thinking and problem solving for a problem where no structure or guidance had been offered in regulations, statutes, or judicial interpretation. With this profile as a backdrop, it is easy to see why an effort was underway at the federal level to provide structure in this difficult, compromising area of school problems.

¹³⁴Ibid., 69.

¹³⁵Barbara L. Ludlow, "Handicapped Students and School Discipline: Guidelines for Administrators," The High School Journal, Oct/Nov 1982, 14.

Adamson addressed the use of suspension and expulsion of handicapped children as disciplinary tools and concluded that there are six concepts on which courts have based their decisions and which administrators should consider in their formulation of policy:

1. Free and Appropriate Public Education (FAPE). 45 CFR 121a.1
2. Least Restrictive Environment (LRE). 45 CFR 121a.550, 551
3. Team decisions. 45 CFR 121a.553(a)(3)
4. Individual Education Program (IEP). 45 CFR 121a.340
5. Due Process. 45 CFR 121a.500
6. Stay Put Rule. 45 CFR 121a.513¹³⁶

The Multidisciplinary Team Conference (MDC) is the mechanism built into 94-142 to permit a team of specialized and knowledgeable persons--not an individual or Board of Education--charged with deciding what is and what is not appropriate in any given time place and circumstances.¹³⁷ The greater involvement and integration of handicapped children back into the regular classes may overshadow the fact that these students still retain the rights of handicapped children. Also, students in the mainstream with similar problems may also have a legal window by virtue of

¹³⁶David R. Adamson, "Expulsion, Suspension, and the Handicapped Student," NASSP BULLETIN 68, no.471(April 1984): 96.

¹³⁷34 CFR 300.553(a)(3).

section 504 which could initiate further evaluation and discovery.¹³⁸

Adamson supports writing IEPs so as to include consequences for known disruptive students to both expedite and provide tools for acting quickly when needed.¹³⁹

When in-school suspension programs were first developed they were not designed to include special education students.¹⁴⁰ The action of transferring to a more controlled setting can be viewed as disrupting the handicapped child's access to education. Also, this becomes a major issue since such actions effectively remove the student from the current course of study and removes the procedural protection to assure that any program changes are in the handicapped student's best interest. Thus, the burden falls on the public school district to prove the value of discipline and learning quality of experiencing consequences for inappropriate actions.¹⁴¹

Simon saw the IEP as the most effective tool to deal with discipline. The IEP allowed for anticipation of

¹³⁸Richard E. Ekstrand, "Discipline and the Handicapped Student," Education and Urban Society, 14,#2, February 1982, 166.

¹³⁹Adamson, "Expulsion,Suspension," 95.

¹⁴⁰Claiborne R. Winborne, "In-School Suspension Programs: the Ding William County Model, Educational Leadership, 37(March): 466-69.

¹⁴¹Sue Simon, "Discipline in the Public Schools: A Dual Standard for Handicapped and Nonhandicapped Students?," Journal of Law and Education, Vol. 13, no.2, 214.

outbursts and spell out appropriate actions to consider which could involve a change of placement. It is this type of planning that remains intact and cannot be denied parents.¹⁴²

Basic tenets of good teaching should prevail for the handicapped child as well as any other child in an educational setting. Determination of appropriate instructional level, rate of presentation, modeling, monitoring, guided practice, checking for understanding, avoidance of distraction, provision of necessary prerequisite skills are all considerations that typical planning and IEP development take into account. Deviation in any of these areas may be the cause for initiation of inappropriate behavior and, as a result, should be considered when examination is made of the appropriateness of the placement. Boredom breeds problems and should be avoided at all costs.

Leone speculated that the more students and special teachers are involved with extra curricular activities, the less likely there will be a display of attention getting behaviors. This is based on the team aspect or esprit de corp mind set.¹⁴³ This is often quite difficult because of the commonality of special education classes being located outside normal student attendance areas. The law and its

¹⁴²Ibid., 237.

¹⁴³Leone, "Suspension, Expulsion," 112.

accompanying regulations, however, clearly states that this alternative--education in other than the school the child would normally attend--should occur only after all efforts are made to provide the program at the normal attendance school with supplemental services and modifications.¹⁴⁴

Formulation of Policy

Funding tied to 94-142 requires school districts to qualify by formulating policy and establishing procedures that can be evaluated and serve as criteria for assurances of compliance with all aspects of the law.¹⁴⁵ State education agencies require these policies and procedures and use federal standards to monitor assurances and compliance by local education agencies.

Turner reviewed significant court cases, rules and regulations, and agency guidelines and suggested four key considerations be included in formulation of disciplinary policy:

- (1) Short term emergency suspensions of up to three days can be imposed on special education students without prior hearing or consideration of relatedness to handicap.
- (2) Suspensions of up to ten days may be imposed after consideration of

¹⁴⁴34 CFR 300.550-551.

¹⁴⁵20 USC § 1412(1) provides in part: "In order to qualify for assistance under this subchapter in any fiscal year, a state shall demonstrate to the commissioner that the following conditions are met: (1)the state has in effect a policy that assures all handicapped children the rights to a free appropriate public education.

relatedness and provision of alternative educational service.

- (3) Expulsion be imposed only after all procedural safeguards have been followed, a pupil placement team considers relatedness, and an alternative form of educational service be provided.
- (4) Disruptive behavior endangering self or others should cause immediate removal on a temporary basis until other measures can be taken.¹⁴⁶

Implementation of 94-142 has led to a number of state and local rules and regulations and court decisions designed to protect handicapped children and youth from arbitrary or discriminatory removal from their prescribed individual educational programs. As momentum grew with the new law, continued confrontation and challenge surfaced in many areas. The Phi Delta Kappa Educational Foundation supported an effort to assist school authorities with this challenge as momentum continued to build towards the questions of "Have we gone to far?" and "Is it too expensive to provide the handicapped their due rights?"¹⁴⁷ Turner suggested guidelines for discipline policy development as part of the expanding need for school boards and administrators to modify and adjust operations to incorporate the handicapped into daily school life. Turner's four suggestions

¹⁴⁶Donald G. Turner, "Legal Issues in Education of the Handicapped," Fastback 186, Phi Delta Kappa Educational Foundation, Bloomington, Ind. 1983, p.27-28.

¹⁴⁷Ibid., 27.

represented a continuing effort to struggle and find consensus for managing an unstructured educational problem:

1. It appears that, in most court jurisdictions, short-term emergency suspensions (up to three days) can be imposed on special education students without prior hearing and without a formal determination as to whether or not they are being punished for misbehavior related to their handicapping conditions.
2. At least one federal court has held that special education students can be suspended for non-emergency causes for up to 10 days without the suspension being considered a change in placement requiring use of procedural safeguards. I would recommend that school authorities impose a suspension of that length without first determining whether or not the misbehavior is related to the student's handicapping condition and without making some provision for alternative educational services.
3. Most courts have held that expulsion constitutes a change in educational placement. I suggest that expulsion of handicapped students be imposed only after school authorities have followed all the procedural safeguards required by P.L.94-142 and section 504. A pupil placement team, which includes broader representation than just school administrators and board members, should determine that such expulsion is imposed for behavior not related to the handicapping condition. If expulsion is imposed, the school district should provide some alternative form of educational services, such as tutorial instruction in the home.
4. If the disruptive behavior of a handicapped student results in eminent danger to himself or herself or to others, school authorities have a right (and even a duty) to remove that student on a temporary basis until other measures can be taken.¹⁴⁸

Martha J. Fields, Assistant State Superintendent for the Maryland State Department of Education sought a

¹⁴⁸Ibid., 28.

clarification of OSEP position on serial or consecutive suspensions totaling more than 10 days.¹⁴⁹ She received a response from Dr. Bellamy of OSEP who indicated that the position of that agency supported a suspension or expulsion of a handicapped student of more than ten days triggered procedural safeguards offering a due process hearing to parents.¹⁵⁰ Dr. Bellamy also indicated that "OSEP has not developed a position on when a series of shorter suspensions would cumulate to constitute a change in placement."¹⁵¹ He suggested that repeated suspensions typically are outward expressions that the programs and services currently provided may not be appropriate and should probably be reviewed.¹⁵² This is an accurate assessment of the critical point in disciplinary routines established over time which resulted in exclusion of many handicapped children. Such practice of ignoring these signs kept children with handicaps out of school and undoubtedly perpetuated a drop out attitude.

Honig v. Doe--the Case Anticipated to Provide Answers

The Supreme Court ruled on a case in January 1988 involving the expulsion of two emotionally disturbed

¹⁴⁹Martha J. Fields, Letter to Patricia Guard, Office for Special Education Programs, January 7, 1987.

¹⁵⁰G. Thomas Bellamy, response to letter of Martha J. Fields, February 26, 1987.

¹⁵¹Ibid.

¹⁵²Ibid., 2.

students. This case was followed closely as the case to finally provide ultimate direction to address the expulsion issue as it related to special education.

In 1988, Sarzynski¹⁵³ revisits discipline as it applied to the handicapped student and used the remarks made by the Court as it addressed the issue in *Doe v. Maher*¹⁵⁴:

Our examination of the EHCA and its regulations has left us with the firm conviction that federal law respecting the educational rights of handicapped children is not a model of clarity. As we have indicated, the issues are exquisitely difficult. Their avoidance by Congress and administrators is understandable. Courts, however, must confront those questions fairly presented to them. The district court did thus and, although we do not agree with all of its holdings, we commend its effort.¹⁵⁵

The Maryland State Department of Education on May 26, 1988 wrote the U.S. Office of Special Education Programs (OSEP) requesting a review of their proposed amendments to Maryland laws and policies on the suspension and expulsion practices applied to handicapped children relative to the U.S. Supreme Court's decision in *Honig v. Doe*.¹⁵⁶ Based on the Honig decision it was necessary for Maryland to limit emergency suspension to ten days. Direction was also given to provide notice to parents in the event that a

¹⁵³Edward J. Sarzynski, J.D., "Disciplining a Handicapped Student," 46 Ed. Law Rep. 17 (June 23, 1988), 17.

¹⁵⁴*Doe v. Maher*, 793 F.2d 1470, 1495.

¹⁵⁵Sarzynski, "Disciplining Handicapped," 23.

¹⁵⁶EHLR, "EHA Rulings/Policy Letters, supplement 232, January 13, 1989, 213:179.

school district would change a student's placement for more than ten days. Maryland's proposed rules required notice be given to parents when long term suspension and/or expulsion was to take place. Confusion about the need to consider the child's handicapping condition relative to the inappropriate behavior existed because of a dual role shared between a local district's ARD(Admission, Review, and Dismissal) team and the county superintendent's office. It appeared as if the county superintendent could impose a long term suspension/expulsion of a handicapped child prior to the ARD team giving consideration to the child's handicapping condition or possibly an inappropriate placement. And finally, the timing of the notice given to parents needed to be clearly spelled out that such notice is to be given **before** such action took place.¹⁵⁷

Sarzynski points out that the *Honig* court focused primarily on discipline as it applies to the dangerous handicapped student thereby limiting the scope of the application or ruling as hoped for by many.¹⁵⁸

Sarzynski portrays the anticipation faced in the field when the Supreme Court agreed to hear a case involving disciplining of an handicapped child by using expulsion and characterizes this anticipation in stating that "substantial uncertainty has existed in a difficult area of law over

¹⁵⁷Sarzynski, "Disciplining Handicapped," 22.

¹⁵⁸*Ibid.*

whether a handicapped student can be disciplined for an act of misbehavior and, if so, what procedures have to be followed before discipline can be imposed."¹⁵⁹

Sarzynski further criticizes the case pointing out that eight years were needed to litigate and that the court focus on the issue taken from the context involving discipline of a dangerous handicapped student tended to ultimately obtaining a broad based decision applicable to a greater number of cases and handicapping conditions.¹⁶⁰

Sarzynski feels that the Court's decision did not clarify the approval of suspension for up to ten days to all handicapped children.¹⁶¹ He noted, however, that by footnoting a reference from the Department of Education's position that a suspension of up to ten days does not constitute a change in placement, the Court in effect, embraced this decision.¹⁶² Thus, another interpretation was made by inference. He concluded that by holding "that truly dangerous handicapped students are not immune from disciplinary measures, the Court may have actually created immunity for all handicapped students from suspension greater than ten days."¹⁶³

¹⁵⁹Ibid., 23.

¹⁶⁰Ibid., 24.

¹⁶¹Ibid., 24.

¹⁶²Ibid., 24.

¹⁶³Ibid., 25.

Bartlett felt that *Honig* did not directly address the issue of expulsion as a change in placement but rather inferred it through a footnote.¹⁶⁴ This is of importance in view of the previous agreement the court has taken on this issue in past cases. The remedial nature of the law and change of placement issue appear to go hand in hand and infer no termination.

Bartlett saw the problem with expulsion as a termination of mandated free and appropriate education.¹⁶⁵ Use of the word "termination" is questioned. Postponement would be a more appropriate term combined with the use of consequence to truly reflect the quality of the action. As long as handicapped students are disciplined like nonhandicapped students they are not entitled to any special or unique exemptions or privileges. Reducing or changing a program for disciplinary reasons is appropriate as long as the correct change of placement procedures are followed. This includes informed consent by parents and their right to challenge through due process and litigation.

Summary

The open ended nature of disciplining handicapped children and youth relative to specific wording in the law has, in many respects, served as an incentive to develop greater skill in the diagnostic process, create a need to

¹⁶⁴Bartlett, "Disciplining Handicapped," 361.

¹⁶⁵*Ibid.*, 362.

have a good knowledge base of the law, reinforced the requirement to develop and implement a continuum of programs and services, forced monitoring and development of quality in programs, worked to instill parents and handicapped youth an attitude to appreciate the significance and value of education in their lives, and worked to maintain the focus on the individual child and his/her specific needs.

Difficulty occurs when review of court cases is made and generalizations occur about the interpretation. Facts from case to case are different but sometimes appear to be very similar. Upon close scrutiny, each case is very unique. Despite this caution it is obvious from review of the literature that policy patterns did form, trends and principles became generalized and influenced interpretation, diversified implementation practices, and creative thinking in the field of special education.

Chapter III
COURT DECISIONS

Introduction

Litigation is the last step in conflict resolution as provided under the Education of Handicapped Children's Act (P.L. 94-142).¹ This right of review by the courts was adopted by a conference committee and was not a part of the original Senate bill. The committee report states:

Such action may be brought in any State court of competent jurisdiction or in any district court of the United States and in any such action the court shall receive the records of the due process hearing (and where appropriate the records of the review of such hearings), shall hear additional evidence at the request of any party, shall make an independent decision based on the preponderance of the evidence, and shall grant all appropriate relief.²

Subsequently, authority was established in the Federal rules and regulations to provide a right to the party aggrieved by the final administrative decision to bring civil action in a district court.³

¹20 U.S.C. § 1415(e)(2).

²Joint Explanatory Statement of the Committee of Conference, in Senate Conference Report No. 94-455, 50.

³20 U.S.C. § 1415(e)(2).

Much can be learned from the research and opinions established by those who have wrestled with issues not clearly defined by law or consistent with the mores and attitudes of the constituencies effected by the laws and/or regulations. Clearly, this was the case with expulsion of handicapped children. The issue is a conduit for return to former practices which blatantly discriminated against the handicapped for many years prior to P.L.94-142 and Section 504 and continues today because of continued unclear interpretation and inconsistent application of law and rule. The following section of this study provides an historical review of federal court cases on the issue of expulsion of handicapped children and can help develop effective policy in this crucial area.

Stuart v. Nappi (Conn., 1978)⁴

This case was brought before the court seeking a preliminary injunction of an expulsion hearing by the board of education. As the first federal court case to address expulsion of a handicapped child from a public school⁵, the district court acknowledged the regulations that had recently (October 1, 1977) gone into effect as the

⁴Stuart v. Nappi, 443 F. Supp. 1235 (Conn. 1978).

⁵Ibid., 1241. "This is a case of first impression. Although there are no decisions in which the relation between the special education processes and disciplinary procedures is discussed, the regulations promulgated under the new law are helpful."

"regulations on which this decision turns."⁶ Within the context of seeking an injunction, the parents had to demonstrate (1) probable success on the merits of her claim and possible irreparable injury or (2) sufficiently serious questions going to the merits of her claim and a balance of hardships tipping decidedly in her favor.⁷

This high school student was served in a program for students with learning disabilities and had a record of behavior difficulties and poor attendance. The record showed problems beginning in 1975 which included failure on the part of the district to follow through on recommendations of its staff for testing and considering this student for special education. Once the process was completed, the student did well in school initially but then started to miss class and subsequently, in the eyes of the teaching staff, developed emotional and behavioral problems.⁸ Even after this observation and opinion by staff to change her placement, no meeting was held to change the placement or consider any change. The following year

⁶Ibid, 1237. Also, See Federal Register vol. 42, p.42,473 (to be codified in 45 C.F.R. 121a).

⁷Ibid., 1240.

⁸Ibid., 1238. After a psychological examination was administered a year after being recommended, the report summarized test findings and comments of staff and concluded: "I can only imagine that someone with such deficit and lack of development must feel utterly lost and humiliated at this point in adolescence in a public school where other students...are performing in such contrast to her."

her attendance continued to decline and inappropriate behavior continued to escalate. After the student was involved in a school-wide disturbance, she was suspended for ten days. Following her suspension, the superintendent recommended that she be expelled for the remainder of the year. The student's parents requested an impartial hearing and a review of the student's education program but were denied. The parents then filed for an injunction requesting that the school system be enjoined from conducting a hearing to expel their daughter. At no time was this student ever shown to be a danger to herself or others.⁹

The significant questions raised as issues to demonstrate the probable success of a judgment for the parents in this case were characterized as four federal claims under PL 94-142. These four claims resulted in the family demonstrating that:

1. Their daughter was denied her right to an appropriate education.
2. She had the right to remain in her present placement until the resolution of her special education complaint.
3. She had a right to an education in the least restrictive environment.
4. She was denied by the proposed expulsion of her right to have all changes of placement occur in accordance with the procedures of the P.L. 94-142 regulations.¹⁰

⁹Ibid., 1239.

¹⁰Ibid., 1240.

To demonstrate *possible* irreparable injury to support the request for issuance of a preliminary injunction, the parents argued that expulsion would leave her without an educational program until such time as the special team again would meet and formulate an appropriate educational program. Based on the past delays and unexplained lack of timely action and follow-up, the court saw this situation as significant and potentially harmful and was concerned about the outcomes and recommendations of the team even if they were to meet. Further hardships were anticipated by the court if she was expelled. The status of her exclusion from any special programs at her current high school would have left her with very few remaining options which included homebound or possibly private placement. Private placement was questioned in relationship to availability and potential for being educated to the greatest extent possible with non-handicapped peers. If private placement was not available she would have to be placed on home instruction which would limit as well as hinder her social development which was perceived as a cycle in which she was already involved.

The court concluded that "plaintiff's expulsion would have been accompanied by a very real possibility of irreparable injury."¹¹

¹¹Ibid., 1240.

This case addressed the issue of expulsion as a violation of the stay put rule,¹² and concluded that:

There is no indication in either the regulations or the comments thereto that schools should be permitted to expel a handicapped child while a special education complaint is pending.¹³

The issue of expulsion after complaint proceedings are completed was also addressed by the court. Such practice could allow schools to circumvent the requirement to provide education in the least restrictive environment while also severely limiting the alternatives that may be available. The court indicated its agreement with HEW's position of using suspension to replace expulsion as a means of removing disruptive handicapped children from school. The basis for this interpretation was supported by the department's comment on comments received on the proposed rules:

Commenters suggested a provision be added to allow change of placement for health or safety reasons. One commenter requested that the regulations indicate that suspension not be considered a change in placement. Another commenter wanted more specificity to make it clear that where an initial placement is involved, the child be placed in the regular education program or if the parents agree, in an interim special placement.

Response: A comment has been added to make it clear that this section would not preclude a public agency from using its regular procedures for dealing with emergencies. 42 Fed.Reg. 42,473, 42,512 (1977)(to follow codification at 45 C.F.R. § 121a.513).¹⁴

¹²20 U.S.C. § 1415(e)(3).

¹³Stewart, 1242.

¹⁴Ibid., 1242.

The court acknowledged that the act covered the opportunity and procedure for transferring children who are disruptive and interfering with the education of other children. This was noted as possible through use of suspension, which is limited to ten days, and the change of placement procedures available in the act which requires the use of teams, involvement of parents, and the opportunity to formally challenge any decision through due process. The court also notes that such consideration was built into the law and regulation noting the requirement for districts to provide a continuum of services including such alternatives as regular classes, special classes, private schools, the child's home and other institutions.¹⁵ Inappropriateness of placement was characterized in this case by reference to criteria as established by an explanation derived from a comment to the Rehabilitation Act of 1973, 29 U.S.C. § 794:

The comment to 45 C.F.R. § 121a.552 explains that a handicapped child's placement is inappropriate whenever the child becomes so disruptive that the education of other students is significantly impaired.¹⁶

The court also indicated that the responsibility for changing a handicapped child's placement was the responsibility of professional teams made up of individuals knowledgeable about the child and the handicapping

¹⁵Ibid.

¹⁶Ibid., 1243. Also see Federal Register vol. 42, pp.22,676, 22691.

condition.¹⁷ It is interesting to note that the court footnoted and characterized its opinion as "intriguing" that the plaintiff makes a state claim that the student is entitled to a current psychological evaluation and team determination that her current placement is adequate. This notation and opinion appears to be a reflection of the newness of regulations and their application during this time period. If deprived of this opportunity she would not be able "to present evidence on all issues involved." This interpretation is logical and consistent with federal regulations related to consideration for changing placement but seen by both the court and plaintiff's counsel in this first case as only a state issue.

The court, to conclude its deliberation on this case, stated that it was cognizant of the need for school officials to be vested with ample authority and discretion, and believed it extremely important to clarify the parameters of their decision:

It is, therefore, with great reluctance that the Court has intervened in the disciplinary process of Danbury High School. However, this intervention is of a limited nature. Handicapped children are neither immune from a school's disciplinary process nor are they entitled to participate in programs when their behavior impairs the education of the other children in the program.¹⁸

¹⁷Ibid.

¹⁸Ibid.

Finally, the school district contended in presenting its case to the court that the procedures for securing special education are different from disciplinary procedures and, therefore, "one process should not interfere with the other." The court responded:

This contention is based on a non sequitur. The inference that the special education and disciplinary procedures cannot conflict does not follow from the premise that these are separate processes. Defendants are really asking the Court to refuse to resolve an obvious conflict between these procedures. This Court will not oblige them.¹⁹

Thus, the stage was set for clarifying both the right of the court to intervene, the procedure for expelling students recognized as not appropriate to change a handicapped student's placement, the professional team as the required body to make changes of placement, short term handling of students who are a danger to themselves and/or others and long term resolution through change of placement in a more restrictive environment, and the true genius of the entire process as a means to ensure that the rights of individuals with handicaps be upheld.

Howard S. v. Friendswood Independent School District
(Texas, 1978)²⁰

This high school student was enrolled in an SLD (Specific Learning Disabilities) program. During his

¹⁹Ibid., 1244.

²⁰Howard S. v. Friendswood, 454 F.Supp. 634 (Texas, 1978).

elementary and middle school years he received special education having been diagnosed as minimal brain damaged and normal intelligence but demonstrating markedly slow progress.²¹ His short attention span, hyperactivity, and demand for attention were addressed initially in special classes and then through resource help and counseling in middle school. His disciplinary problems, resulting from truancy and wandering the halls, were first noted when he entered high school.

Expert witnesses substantiated that this type of behavior resulting from the experience of adjusting to high school and puberty were typical of a student with such handicaps. However, the assistant principal saw such behavior as typically covered under the schools disciplinary policy and, subsequently, failed to notify the special education department of discipline problems. No effort was made to consider the behavior in relationship to the student's handicaps.²² Adjustment problems of a similar nature were also occurring at the same time at home causing the family to seek professional help. Soon after beginning treatment with a psychiatrist, the student attempted suicide and was hospitalized for several weeks. While hospitalized, the school district "officially dropped" this student without notice to the parents. The school's placement

²¹Ibid., 635.

²²Ibid, 636.

committee dismissed him from the program following the usual procedures regarding students who move. The parents still resided within the school district. The court ruled:

This effective and constructive expulsion occurred without notice to the parents, without a hearing of any kind, and is a clear violation of the FISD's obligation under the Constitution of the United States. See *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct.729, 42L.Ed.2d 725(1974).²³

Upon release, the student's physician recommended to the parents that he be placed in a private residential school located in another school district within the state. The parents' request for reimbursement for the private placement was denied by school officials who claimed that the student was no longer enrolled. Parents request for a due process hearing was denied by the school district. The court opined that this action by the school district "intentionally evading and avoiding its responsibility to provide an impartial due process hearing."²⁴

As in *Stuart v. Nappi*, the issue of the school district providing the student with a free appropriate education was addressed.

The court found that the school district failed to provide the student with a free appropriate public education and this failure was a contributing cause of the student's severe emotional difficulties. The student's dismissal, as

²³Ibid.

²⁴Ibid., 637.

it was managed by the school district, was judged by the court as a constructive expulsion which occurred without notice to the parents and without a hearing of any kind, and was in clear violation of the school district's obligation under the Constitution of the United States.²⁵

This case came at a time when P.L. 94-142 had just been signed into law and its implementing regulations were being introduced and operationalized. However, the court ruled:

It is true that in July 1977 the Education for All Handicapped Children Act of 1975(20 U.S.C. § 1401 et seq.) had not become fully operative, and the regulations pursuant to that statute had not been published; the plan of the State of Texas for compliance with that act had not been approved; however, FISD was still obligated to comply with the Rehabilitation Act of 1973 (29 U.S.C. § 794) and with the Constitutions of the United States.²⁶

The court made it very clear that its interpretation of P.L. 94-142 required that the school district must evaluate the student's present level of performance, develop an IEP and provide for appropriate educational services for the student. Since none was in place as required by law, the court ordered that the school district create a due process hearing system consistent with EAHCA (P.L. 94-142).²⁷

The situation of intentional and willful avoidance of responsibility and the possibility of personal liability

²⁵Ibid.

²⁶Ibid.

²⁷Ibid.

being imposed upon school board members for failure to comply with their legal obligation was addressed in this case making reference to Justice White's language in *Wood v. Strickland*, where he stated:

The official, himself, must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with the supervision of students' daily lives, than by the presence of actual malice.²⁸

Payment of residential costs as a responsibility of local districts when needed to provide a handicapped student with a free appropriate education was a marked departure from local districts' obligations before P.L. 94-142 was passed. While no specific reference was made to actual dollar amounts attributed to the residential costs associated with this student's placement at the Oaks Treatment center at Browns School nor the school district's obligation for those costs according to Texas state or local rules and regulations, the Brown's school tuition ran into hundreds of thousands of dollars.²⁹ The court addressed this major obligation:

²⁸420 U.S. 308 at 321.

²⁹Rates for private facilities were continually amended and approved by the Governor's Purchase Care Review Board in Illinois after passage of P.L.94-142. This was necessary to separate the educational costs from total treatment costs particular for facilities like Brown's School. Ultimately, the facility was dropped from the approved lists because of this compliance issue.

Reference to the legislative history reveals that it was the judgment of the Congress that the apparently substantial expense of compliance with Education for All Handicapped Children Act of 1975(Public Law 94-142, 20 U.S.C. § 1401) is actually much less than the cost of life-long institutionalization. Senate Report 94-168, U.S. Code Cong. & Admin.News 1975, pp. 1425, 1433 says:

The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.³⁰

This decision squarely set in place an interpretation of the new law, the obligation of schools to implement the law, the importance of all students and their respective rights, the obligation for room and board cost under certain circumstances, the necessity to have a due process procedure in place, residency as an issue in the obligation to serve students, and the importance of considering the relationship of a student's handicapping condition and inappropriate behavior.

Sherry v. New York State Education Department
(New York, 1979)³¹

The next case instructive on the issue of expulsion of handicapped students involved a student who did not attend a

³⁰Ibid., 641.

³¹Sherry v. New York State Ed. Dept., 479 F.Supp. 1328 (New York, 1979).

regular school. *Sherry v. New York State Education Department* involved a fourteen year old multiply handicapped (deaf, blind, emotional disturbed) child who was removed from a state school for the blind and hospitalized for treatment of self-inflicted injuries. Shortly afterwards, the school superintendent informed the parents that until the child's condition changed, or until more staff were hired, the student could not return. The local school district, after providing a temporary alternative program for Sherry for about two weeks, reconvened and refused to serve the student, alleging that it had no program to meet her needs. The school district recommended the state school as the appropriate educational program. Services from the local school district were dropped at the start of the Christmas holiday. After the parents requested an impartial hearing from the state school, the state school suspended the child indefinitely and offered the parents an informal hearing with the right to representation by counsel. Later in January, supervisory staff were employed and Sherry was permitted to re-enter school.

The major issues in this case addressed the questions of whether a student who is enrolled in a state school for the blind is entitled to an impartial due process hearing which met the requirements of EAHCA and whether the school's act to suspend violated EAHCA and Section 504 provisions for a free and appropriate education.

The school's decision to suspend, based on a lack of supervisory staff, was determined by the court to be unlawful under EAHCA and Section 504 and the school district's alleged concern for the child's own safety was rejected. The court indicated that the law and implementing regulations were clear on the matter requiring the education agency to provide the related services necessary for an appropriate education:

Nonetheless, this cannot be a substantial justification when the concern could have been alleviated or eliminated if the defendants had complied with their duty to provide the service of supervision as part of her appropriate educational program. A defense of lack of staff cannot justify a default by defendants in the provision of an appropriate education to the plaintiff.³²

The court also concluded that this handicapped student was entitled to all of the procedural safeguards under the regulations of P.L. 94-142, including an impartial due process hearing regarding the change in placement. State agency rules and regulations were inconsistent and did not comply with P.L. 94-142 rules and regulations (specifically the stay put rule and right to due process before an impartial hearing officer) as required.³³ The court didn't believe that the protection provided by law could be ignored when a temporary, emergency response to a handicapped student's behavior becomes a change in placement. The court

³²Ibid., 1339.

³³Ibid., 1337.

concluded that indefinite suspension is a change of educational placement within the meaning of the EAHCA and the stay put rule was in effect thereby entitling Sherry to return during the pendency of any hearing or litigation.

Sherry's return occurred before the court concluded its deliberation. The court, however, continued and ruled accordingly since it determined that such an incident would likely occur at another time.³⁴

Doe v. Koger(Ind., 1979)³⁵

After being suspended on October 18, 1978 for disciplinary reasons and following an expulsion hearing, this mildly mentally handicapped student was expelled for the remainder of the school year. Two days before the expulsion, the student's attorney informed the school district that they were requesting an appeal of the expulsion. On December 18, 1978, both parties agreed to have the student placed in an interim educational program at school beginning January 3, 1979. The student attended this interim program for the remainder of the school year while federal court action proceeded.

The singular issue before the court was the question of whether expulsion violated the student's rights under EAHCA and the Equal Protection Clause of the 14th Amendment.

³⁴Ibid., 1335.

³⁵Doe v. Koger, 480 F.Supp. 225 (Indiana, 1979).

The court interpreted the EAHCA as intending to limit a school's right to expel handicapped students. However, the court's deliberation also concluded that neither the EAHCA nor its implementing regulations provide for the expulsion of handicapped students, or does it prohibit all expulsions of handicapped students so long as procedural protection of due process are followed:

But the Handicapped Act does not prohibit all expulsions of disruptive handicapped children. It only prohibits the expulsion of handicapped children who are disruptive because of their handicap. Whether a handicapped child may be expelled because of his disruptive behavior depends on the reasons for the disruptive behavior. If the reason is the handicap, the child cannot be expelled. If the reason is not the handicap, the child can be expelled.³⁶

The court made it clear that schools may not expel students whose handicaps cause them to be disruptive. In situations where this relationship between behavior and handicapping condition exist, the court concluded that appropriate placements must be provided in a more restrictive environment. The court felt that a disruptive handicapped student may be suspended only if the school is unable to immediately place the student in an appropriate, more restrictive environment. The court saw as very significant the action of the school district prior to taking such extreme disciplinary action and ruled that prior to expelling a handicapped child it must be determined,

³⁶Ibid., 229.

through the change of placement procedures of EAHCA, whether the disruptive behavior is caused by the handicapped. At no time could an expulsion of a handicapped student be considered until it is determined that the student has been appropriately placed. This position was similar to the ruling in *Stuart v. Nappi*, 443 F.Supp. 1235(D.Conn, 1978). The Koger court clearly stated:

As HEW interpreted the Handicapped Act, schools were not to expel students whose handicaps caused them to be disruptive: rather, schools were to appropriately place such students. The Court must agree with HEW's interpretation. Congress's intent in adopting the Handicapped Act is clear. A school which accepts Handicapped Act funds is prohibited from expelling students whose handicaps cause them to be disruptive. The school is allowed only to transfer the disruptive student to an appropriate, more restrictive, environment.³⁷

The *Rodriguez* Supreme Court decision clarified that education is not a fundamental right.³⁸ Emphasizing the *Rodriguez* holding that the Constitution only requires that if a state makes education available to one resident, then it must make education equally available to all residents, the Koger court squarely addressed the issues of when mandatory service to all handicapped is to be provided, the difference between handicapped and regular in an expulsion situation and the method to be used for determining

³⁷Ibid., 228.

³⁸*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

application of the required difference between special education and regular students:

While 20 U.S.C. § 1412 and its accompanying regulations require schools to guarantee that handicapped students have the right to be educated, they do not require schools to guarantee that handicapped students be educated. It is the purpose of the Handicapped Act and its accompanying regulations to provide handicapped students placement which will guarantee their education despite the students' handicap. It is not the purpose of the Handicapped Act to provide handicapped students placement which will guarantee their education despite the students' will to cause trouble. For an appropriately placed handicapped child, expulsion is just as available as for any other child. Between a handicapped child and any other child, the distinction is that, unlike any other disruptive child, before a disruptive handicapped child can be expelled, it must be determined whether the handicap is the cause of the child's propensity to disrupt.

And this issue must be determined through the change of placement procedures required by the Handicapped act. Since it is the Handicapped Act which requires the consideration of whether a handicapped child's propensity to disrupt is caused by his handicap, Handicapped Act procedures should be followed. The procedures best suited to protect Handicapped Act rights are the procedures provided by the Handicapped Act. When a handicapped child is involved, expulsion must not be pursued until after it has been determined that the handicapped child has been appropriately placed.³⁹

The *Rodriguez* decision was also referenced and used to clarify the issue of equal protection as raised in relationship to disciplinary expulsion of the handicapped:

It is not the purpose of the equal protection clause to guarantee that members of a suspect class be given superior rights under a given

³⁹Ibid., 229.

policy. The equal protection clause doesn't require a state to guarantee more education to students with a greater need of an education; rather, the equal protection clause requires a state to guarantee an equal educational opportunity to all students. *Id.* To subject the handicapped to the same disciplinary expulsions as other students is not to invidiously discriminate against the handicapped.

It cannot be contested that disciplinary expulsions are rational. Having undertaken to educate its residents, a state has a duty to provide all students with an equal education opportunity. *Id.* A disruptive student interferes with the education of other students in his school. It is quite rational for a school to reserve the option of expelling any student who is interfering with the education of other students. At least with regard to the handicapped, whatever dangers of invidious discrimination are presented by a policy of disciplinary expulsions, those dangers are outweighed by the rationality of disciplinary expulsions.⁴⁰

This is perhaps the most clearly stated, soundly defended, direct address to the critical issues of expulsion written by any court.

P-1 v. Shedd (Conn., 1979)⁴¹

Is there a special status gained by being considered for special education? The *P-1 v. Shedd* class action suit is one example of how the court has addressed this situation and/or special status based on potential or impending need of a student.

⁴⁰*Ibid.*, 230.

⁴¹EHLR, 551:174. This case is presented for information only and is not considered with other cases for analysis and determination of trends.

A class action suit was brought against the SEA contending noncompliance with a number of the provisions of P.L. 94-142, including the state's procedures for suspension and expulsion of handicapped students. Two consent decrees resulted--one in 1979 and a modified version in 1980. A consent decree is a solution sanctioned by the court as agreed to by both parties. While a consent decree may be viewed as having little legal significance, they are very relevant to the background and history that has occurred in attempting to administer discipline in an undefined area.

The issue addressed in this class action suit sought to clarify under what circumstances students who are either referred for evaluation or identified as handicapped may be suspended or expelled.

The court ruled that no identified handicapped child can be removed more than six times in a school year or more than twice in one week unless so stated in the IEP. It also ruled that no child referred for evaluation or identified as in need of special education shall be removed more than six times in a school year or more than twice a week, suspended for more than ten days or expelled during one school year without first convening the PAT (Pupil Assessment Team). In its deliberation on violence and potential harm, the court ruled that if a child is considered an ongoing threat or danger to self or others, or presents a substantial disruption of the educational process, an emergency

suspension may take place. However, the PAT is required to meet within five school days to evaluate the student's program.

Seen as a preventative measure, the court directed that any child who has not been referred or identified, but who has been suspended for more than 25 days in a school year, or is recommended for expulsion, should be referred to a school based team for possible referral for evaluation.

S-1 v. Turlington(Fla., 1981)⁴²

Nine EMR students were involved in this case resulting in seven being expelled from the school system for the maximum time permitted by state law--the remainder of the school year and all of the following year. The two students not expelled had requested due process hearings regarding their educational programs as did only one of the other seven students. Both requests from students not expelled were denied by the Superintendent. All but one student, S-1, received consideration of relatedness between the behavior and their handicapping condition. The two students denied hearings had requested a hearing solely for that purpose. Consideration of relatedness was provided solely by the superintendent who based the decision on the fact that since the student was not emotionally disturbed, the behavior could not be related to the handicap. The school district denied all requests for due process hearings but

⁴²S-1 v. Turlington, 635 F.2d 342 (Florida, 1981).

agreed to hold conferences to discuss their individual educational programs. The inappropriate behavior on which the expulsions were based included masturbation, sexual acts against other students, insubordination, defiance of authority, vandalism and profanity. The injunction granted was challenged all the way to the Supreme Court where the writ of certiorari was denied. State officials felt that their office lacked authority to intervene because expulsion was considered disciplinary and all disciplinary matters are under local jurisdiction only. The court was found to have properly applied 20 U.S.C. § 1412(6):

The state education agency is responsible for assuring that the requirements of this sub-chapter be carried out and that all educational programs for handicapped children within the state, including all such programs administered by any other state or local agency, will be under the general supervision of persons responsible for educational programs for handicapped children in the state educational agency and shall meet educational standards of the state educational agency.⁴³

The injunction required that all students be properly evaluated and placed in appropriate educational programs.

This case was quite extensive in issues related to race discrimination, inappropriate assessment, and matters of class action complaints. Other issues including expulsion as a change in educational placement, invoking the procedural protection of EAHCA and 504, and EAHCA and Section 504 implementing regulations resulting in a dual

⁴³Ibid., 350.

system of discipline applicable to handicapped and non-handicapped students were the issues addressed in this study. Two other issues were also instructive: (1) the manner in which the court ruled on who was responsible for raising the question of whether the student's misconduct was a manifestation of the student's handicap and (2) the requirement and application of EAHCA regulations requiring local school officials to grant requests for due process hearings.

Also raised as an issue here was the appropriateness of the judge to issue a preliminary injunction. This order appears to be the first of its kind after passage of P.L.94-142 and laid the ground work for the landmark *Honig v. Doe* decision ten years after these students were expelled.

The court ruled that before a handicapped student can be expelled, a trained and knowledgeable group of persons must determine whether the student's misconduct bears a relationship to his handicapping condition.⁴⁴ The contention by school officials that placement teams could never decide that expulsion was appropriate for a handicapped child thereby insulating those students from standard rules for discipline was rejected by the court. The court felt expulsion was a proper disciplinary tool under EAHCA and Section 504, but a complete cessation of

⁴⁴Ibid., 344.

educational services is not to be permitted.⁴⁵ Despite this position, the court did not believe it was establishing a dual disciplinary system. The court emphasized its concurrence with school board authority to remove dangerous students to maintain a safe environment by referencing 45 C.F.R. § 121(a).513(comment)⁴⁶and noting:

Thus the local school board retains the authority to remove a handicapped child from a particular setting upon a proper finding that the child is endangering himself or others. In such case, the child would of course be remanded to the special change of placement procedures for reassignment to an appropriate placement. It is appropriate to superimpose this very limited authority, as contemplated by the above quoted comment, because nothing in the statute, the regulations, or the legislative history suggests that Congress intended to remove from local school boards--who alone are accountable to the entire school community--their long-recognized authority and responsibility to ensure a safe school environment.⁴⁷

The court rejected the contention by the school district that the students knew right from wrong and that, since the students were not emotionally disturbed, the behavior was not related to the handicap. Significant is the courts rejection of these premises because they were seen as generalizations and, therefore, not in conformance with the individual consideration standard intended by

⁴⁵Ibid., 348,

⁴⁶"While the placement may not be changed, this does not preclude dealing with children who are endangering themselves or others."

⁴⁷Ibid., 348.

Congress to be a major plank in the law and enforcing regulations.⁴⁸

Expulsion was interpreted as a change in educational placement thereby invoking the procedural protection of EAHCA and Section 504. The court interpreted EAHCA and 504 as remedial in nature and therefore favoring broad application and liberal interpretation relative to efforts and requirements to provide for free, appropriate education of handicapped students.⁴⁹ The two students that requested due process were entitled to have those hearings. The court made it clear in its interpretation that an expulsion must be accompanied by a determination as to whether the handicapped student's misconduct bears a relationship to his handicap.⁵⁰

Kaelin v. Grubbs (Kentucky, 1982)⁵¹

The student was a 15 year old ninth grader during the 78-79 school year and identified as handicapped, meeting the criteria for EMH since kindergarten. On March 13, 1979, the student refused to complete assigned classroom work. He also destroyed a work-sheet and the teacher's coffee cup. As the student attempted to leave the room, he pushed, kicked, and hit the teacher. He was suspended the next day,

⁴⁸Ibid., 346.

⁴⁹Ibid., 347.

⁵⁰Ibid., 346.

⁵¹Kaelin v. Bd of Ed., 682 F.2d 595 (Ky., 1982).

March 14. The school board held a hearing on the student's behavior on April 17. The board did not convene or discuss this case with the Administrative Admissions and Release Committee(AARC) nor did they consider the relationship, if any, of the handicap to the disruptive behavior. The student was found to have violated school rules and expelled for the remainder of the school year. A due process hearing was requested by the student's counsel to review the Board's decision refusing to convene the AARC prior to his expulsion but was denied.

Once again, the major issue identified in this case also was the question of whether expulsion is a change in placement within the meaning of Handicapped Children Act. Also addressed were the issues of procedural integrity by the school system in the denial of a due process hearing and methods used for considering a change of placement.

The court ruled that the student was expelled without receiving the procedural protection afforded by the Handicapped Children Act and Section 504 implementing regulations.⁵² The court concluded that only the AARC team could change a placement and the fact that team did not meet or consult in the matter was a violation of the rules.

Expulsion from school and the use of expulsion proceedings as a means of changing a placement was interpreted by the court as an inappropriate change in

⁵²Ibid., 598.

placement within the meaning of the Handicapped Children Act if procedural protection of U.S. 20 § 1415 are not followed.⁵³ Significant was the court's statement that "Only the procedural safeguards for removing a handicapped child are affected by our conclusion that an expulsion is a change in educational placement within the meaning of the Handicapped Children Act."⁵⁴ The court went on to clarify its position against the contention that there existed an artificial distinction between suspension and expulsion by addressing two key policy interests:

First, school officials still retain the authority to control violent or anti-social behavior of handicapped children. These students may be suspended temporarily as long as they receive the procedural protection of *Goss v. Lopez*.⁵⁵

⁵³Ibid., 601-602.

⁵⁴Ibid., 602.

⁵⁵419 U.S. 565(1975), In *Goss v. Lopez* the Supreme Court held that students facing a 10-day suspension for disciplinary reasons have property and liberty interests under the due process clause of the Fourteenth Amendment. Accordingly, the court held that "due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* at 581. The court noted that "[t]here need be no delay between the time 'notice' is given and the time of the hearing." *Id.* at 582. As a general rule, however, "notice and hearing should precede removal of the student from school. *Id.*

The Due Process Clause also applies to expulsions of students from tax-supported educational institutions. *Id.* at 576. Therefore, handicapped children have a constitutional right to procedural due process independent of the due process rights provided in the Handicapped Children Act.

Second, one of the principal features of the Handicapped Children Act is the concept of individualized educational planning for handicapped children. This concept would be eviscerated if school officials could expel handicapped children using traditional expulsion procedures. Following the procedures of 20 U.S.C. § 1415, however, preserves individualized education planning for the handicapped child. The AARC can address the important questions of whether the child's disruptive behavior is a manifestation of his handicap and whether the child's educational placement should be changed. Consequently, our holding that an expulsion is a change of placement within the meaning of the Handicapped Children Act strikes a delicate balance between the special educational needs of handicapped children and the need of school officials to discipline disruptive children.⁵⁶

This statement that the same rule applies to all but individuals with handicaps receive consideration of that handicap in relationship to the handicap is an appropriate safety valve that serves as a protection to avoid exculsion of the handicapped as has been observed in history.

Adams Central School District No. 090 v. Deist
(Neb. 1983)⁵⁷

This seventeen year old student was diagnosed as autistic and mentally retarded and initially attended a school for the Trainable Mentally Retarded (TMR) in the morning and a mental health program in the afternoon. He eventually attended the TMR school full time. At age twelve he developed grand mal epilepsy and began to exhibit increasingly disruptive behavior at home and school. In

⁵⁶Kaelin, 603.

⁵⁷Adams Central SD v. Deist, 334 N.W. 2d 775 (Nebraska, 1983).

December of 1977 he was sent home early one day with a note that indicated he could not return to school until his behavior improved. The parents sought and attended a conference the very next day to discuss the note only to find that school indicated that they had no suitable program at the time. They were informed that their son would have to improve his behavior before he could return. Unable to control him at home, the parents placed him full time back in the mental health regional program. No homebound instruction was available because no tutor could be located. Eventually, a tutor was obtained but was not trained in special education. For about four months the child received two hours tutoring per day. The regional staff advised the parents that a residential program was the most appropriate placement for their son. The agency recommended that the parents place him in a state institution. Parents visited and approved but a waiting list of a year existed and the only alternative placement was a locked male ward. Parents refused and placed him in a private program.

The issue before the court was to determine if proper rules of law were applied to reach a decision supported by competent evidence in the record.

Since the state and local districts accepted federal funds, the issue needing verification was to show that their policies in effect provided assurance that all handicapped children were provided an appropriate educational program,

and that this was applicable in this case. Also at issue was the need to show that the final program recommendation was appropriate and commensurate with that provided to other similarly situated students.

Other issues included the question of the residential component as essential to the appropriateness of the program recommended, clarification of the student's removal from the Adams Central Schools as voluntary, a suspension, or an expulsion, if there was a change in placement and if so were procedural protection available, and was there a relationship between the behavior and the handicapping condition to the student.

Finally the court was asked to rule if there was entitlement to compensatory relief, and are parents to be reimbursed for expenditures during the interim period where school was providing no programs or services.

Ample evidence was contained in the record to establish that the hearing officer based all decisions on substantial and competent evidence. The decision for residential placement was upheld by the court to be neither arbitrary nor capricious.⁵⁸ Federal funds were accepted by the state and policies were in effect to provide all students with a free, appropriate education. This student was not provided with a free, appropriate education nor were procedural protections offered. The student was expelled from school

⁵⁸Ibid., 782.

and improperly so since no procedural protection was afforded to the family and no relationship was considered between the handicapping condition and the behavior. The student was effectively deprived of an education, not afforded an alternative in a more restrictive setting, and was placed in a situation where emotional health and physical well being were threatened. Therefore, the parents were awarded reimbursement of expenses they incurred to provide for their child's education as a result of the school's failure to provide:

We conclude that a school district, responsible for providing a "free appropriate public education" to a handicapped child, which fails to furnish adequate facilities and programs to afford such education, is liable to reimburse a parent who, in order to protect the physical and emotional health of such child, does obtain such reasonable services.⁵⁹

Compensatory education beyond age 21, as requested by the parents, went beyond the statutes.⁶⁰ The court considered the act and regulations to be clear and unambiguous on this issue and, therefore, declined to grant such relief.

Victoria L. v. Dist. S.Bd. Lee County(Florida, 1984)⁶¹

This case is reviewed here because in Florida, following *S-1 v. Turlington*, educational services are not

⁵⁹Ibid., 785.

⁶⁰Ibid., 786; 20 U.S.C. § 1412(2)(B).

⁶¹741 F.2d 369 (1984).

terminated despite the continued opportunity being upheld to expel students. This case involved a student with a learning disability attending a regular high school. She had what was considered a mild learning disability and was being provided with part-time resource assistance in a regular high school where she was also able to benefit from regular classes. Her behavior, to the contrary, was extremely unacceptable and considered dangerous by the court. The record indicated that Victoria committed numerous infractions of the school disciplinary code which included smoking, insubordination and skipping of classes. The behavior prompting her change of placement involved bringing a razor blade and a martial arts weapon to school. She also threatened to injure or kill another student.

In going before the district court seeking an injunction against the school to permit Victoria to remain in high school, her counsel presented no evidence but merely asserted it was her right under the 94-142 stay put rule, 20 U.S.C. § 1415(e)(3). The court denied the request for injunction reverting back to evidence presented in the record. This was appealed. She was given adequate notice and time to appeal, was granted an extension, and then failed to provide any supporting evidence. Once again, the record was used and the appeal denied which led to action in the court of appeals. An equal protection claim raised in this case alleged to be guaranteed under 29 U.S.C. § 794 and

the Fourteenth Amendment were determined not necessary to be addressed based on the Supreme Court's recent declaration that the EAHCA provides "the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly funded special education."⁶² Victoria's counsel contended that the district court was negligent in not determining *de novo* whether the special education she was receiving was appropriate. The appellate court disagreed and reaffirmed as significant what the court can and cannot do:

Though the EAHCA requires a district court to determine whether a handicapped child is receiving an appropriate education "based upon the preponderance of the evidence," 20 U.S.C. § 1415(e), it is not free to substitute its own notions of sound educational policy for that of the school board. *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034, 3051, 73 L.Ed.2d 690(1982). An educational plan satisfies the EAHCA if the state has complied with the procedures set forth in the Act and if the special education offered the child is reasonably calculated to enable her to receive educational benefits. *Id.* at 206-07, 102 S.Ct. at 3050-3051.⁶³

Unique to this case was the involvement of a lay representative serving on behalf of the parent. The district court had ruled that the hearing officer was correct in allowing this representative only to advise the parent in the hearing based on his displayed knowledge of applicable state procedural laws(determined to be almost complete ignorance of state administrative procedure). The

⁶²Smith v. Robinson, 104 S.Ct. 3457, 3468.

⁶³Victoria, 373.

parent contended that a parent has a right to direct lay representation in administrative proceedings guaranteed by 20 U.S.C. § 1415(d). The ruling, upheld by the Court of Appeals, stated:

The EAHCA creates no such right. Section 1415(d) states that a complainant has a right "to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children."⁶⁴

Addressing the procedural right to remain in her current high school placement as being guaranteed, the court of appeals disagreed:

Even those cases which interpreted the Rehabilitation Act as expanding handicapped student's rights beyond those specifically afforded by the EAHCA have held that Congress had no intent to deprive local school boards of their traditional authority and responsibility to insure a safe school environment. See, e.g. *S-1 v. Turlington*, 635 F.2d 342, 348 n.9 (5th Cir. 1981) cert. denied 454 U.S., 1030, 102 S.Ct. 566, 70 L.Ed.2d 473. (*S-1* has, of course, been overruled by *Smith v. Robinson* insofar as it applies the Rehabilitation Act to EAHCA cases.) The uncontradicted evidence leaves no doubt that Victoria's behavior at the high school posed a threat to both students and school officials.⁶⁵

The ruling on LRE was significant for two reasons. The first because it confirmed the role of school officials to make such a determination and consider the input of the parent. Parents did not present any evidence that the proposed placement was *inappropriate* nor that another least

⁶⁴Ibid., 373.

⁶⁵Ibid., 374.

restrictive environment existed that would provide Victoria with an appropriate education *while* allowing school authorities to maintain a safe school environment. Secondly, the appropriate position to be maintained by the court to acknowledge that the authority or desire by court to assume the responsibility of the schools or hearing officers is not established under EAHCA:

Though the EAHCA and regulations provide that a handicapped student should be educated in regular classes so far as possible, 20 U.S.C. §§ 1401(18), 1412(5)(B), 1414(a)(1)(C)(iv); 34 C.F.R. §§ 300.4, 300.500, appellant introduced no evidence that the proposed placement was in any way inappropriate or that a less restrictive environment existed in which she could receive the special education she needed while the school authorities maintain a safe school environment. In short, appellant complains that the hearing officer and the district judge failed to substitute their judgment for that of the school board. In the absence of any evidence that the decision to place Victoria in the ALC was in any way erroneous, the EAHCA grants no such power.⁶⁶

Jackson v. Franklin County School Board
*(Mississippi, 1985)*⁶⁷

Student Jackson was a seventeen year old male attending a regular high school with non-handicapped students and participated in extracurricular activities with non-handicapped as well. Since 1979, Jackson was classified as learning disabled and was provided services accordingly. In January of 1984 Jackson became involved with a special education female student at school. He unbuttoned her

⁶⁶Ibid., 374.

⁶⁷765 F.2d 535(1985).

blouse and fondled her breasts which led to a three day suspension. Court proceedings outside of behavioral problems in school were also involved. The resulting hearing and approval of Jackson's mother resulted in his three month commitment to a state hospital for psychiatric evaluation and treatment. He was released, after only one month, to live with his mother but never returned to school for the remainder of the spring semester.⁶⁸ In the fall, school authorities would not let Jackson return without an appropriate educational program in place. Jackson's attorney filed for a preliminary injunction which would permit Jackson to enroll immediately. The district court ordered an IEP meeting to be convened immediately so as to permit Jackson to be readmitted to school. The school offered numerous programs, all at their expense, but none of which included placement in a Franklin County School. Alternatives given included home instruction, vocational or job training, and semi-structured group or foster homes. Jackson and his mother rejected all alternatives and requested a due process hearing and following the stay put rule which would have allowed his continued enrollment in high school under his IEP in effect at the time of the

⁶⁸It's reported in the case that efforts were made by the school social worker to get Jackson into school right away but school officials reportedly denied this request. The appeals court found this circumstance to be irrelevant to the question being addressed and declined to address the district court's finding.

suspension. School refused to honor the stay put rule and mother sought another preliminary injunction. The injunction was denied after the court conducted a hearing which concluded that Jackson's return to school would be disruptive and may pose a threat to himself and others. The court noted that the new IEP was, in their opinion, more appropriate than that available in January of 1984. The hearing held ruled in favor of the school as did the level II appeal.

The appeals court found the issue in this case to be very narrow, namely not the merits of the proposed IEP but whether Jackson should be readmitted under the IEP that was in effect in January of 1984 when he was suspended. The court relied on 20 U.S.C. § 1415(e)(3) which provides:

During the pendency of any proceedings conducted pursuant to this section, unless the state or local education agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

The court felt the directive from this section was clear in its design to preserve the status quo pending resolution of administrative and judicial proceedings under EAHCA. This court also made it clear that it accepts the established right of schools to alter placements when the student endangers self or others or threatens to disrupt a

safe school environment. They cited the following for their position:

This exception to the general rule was recognized in *S-1 v. Turlington*, 635 F.2d 342, 348 n. 9 (5th Cir.1981): "The local school board retains the authority to remove a handicapped child from a particular setting upon a proper finding that the child is endangering himself or others." See also *Stacy G.*, 695 F.2d at 955 n. 5 ("automatic preliminary injunction provided by section 1415(e)(3) does not place a statutory bar to the district court's grant of equitable relief that may result in a modification of the child's placement"); 45 C.F.R. § 300.513 (comment)("While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others")...Other courts also have held that section 1415(e)(3) does not bar a court from exercising its traditional equity powers to modify the placement of a handicapped child during pendency of his IEP appeal..for example *Victoria L. by Carol A. v. District School Board*, 741 F.2d 369 (11th Cir. 1984..."behavior at high school not only proved unacceptable, it had been dangerous." *Id.* at 371. The Eleventh Circuit rejected the student's right under section 1415(e)(3) to remain in high school during the pendency of an appeal concerning her school placement. The court noted that even those courts expanding the rights of handicapped students beyond EAHCA have held that Congress did not intend to deprive local school boards of their traditional authority and responsibility to ensure a safe school environment.*Id.* at 374(citing *S-1 v. Turlington*, 635 F.2d 342 (5th Cir.1981)). Thus the public schools unquestionably retain their authority to remove any student, handicapped or otherwise, who disrupts the educational process or pose a threat to a safe school environment. ⁶⁹

Testimony by the Director of Special Education and Juvenile Court authorities clearly outlined Jackson's previous adjudged delinquency and sexual misconduct with a

⁶⁹*Ibid.*, 538.

three-year-old outside of the school setting that was believed to be significant enough to create unrest and serious emotional effects on other students to the point where Jackson himself would be subject to physical harm. The injunction sought by the parent was denied.

School Board of Prince William v. Malone (Va. 1985)⁷⁰

This case involved a fourteen year old student with a learning disability who was caught participating in the distribution of drugs. His role was a go between for two non-handicapped students in the distribution process. This behavior was considered by the schools PPT team (team of professionals required to evaluate handicapped students and recommend appropriate educational placements) and found not to be related to his handicap. His handicap involved language processing and impairment of his ability to comprehend and analyze written and spoken word.⁷¹ Also considered by the team was his current IEP which included a goal of obeying school rules established because of his previous inappropriate behavior in school. The relationship between behavior and handicap is a basic test and approached by this court within the context that:

there must be a determination of whether the child's behavior was caused by his handicap. To do otherwise would be to expel a child for behavior over which he may have little or no

⁷⁰762 F.2d 1210(4th Cir. 1985).

⁷¹Ibid., 1216.

control. This would hardly be a fair result or one in keeping with the purpose of the EAHCA.⁷²

The district court concurred with the local hearing officer and the state's reviewing officer that a relationship did exist between the inappropriate behavior for which he was expelled and his handicapping condition and added:

A direct result of [the student's] learning disability is a loss of self image, an awareness of lack of peer approval occasioned by ridicule or teasing from his chronological age group. He can't keep pace with his peers. He is ostracized from their group. He doesn't understand their language. These emotional disturbances make him particularly susceptible to peer pressure. Under these circumstances he leaps at a chance for peer approval. He is a ready "stooge" to be set up by his peers engaged in drug trafficking.⁷³

While this case was determined on an individual situation, the relationship issue prevailing here is extremely fragile because there are no established criteria or guidelines and it is therefore, difficult to determine whether the behavior is related to a student's handicap. The addressing of inappropriate behavior in this student's IEP was the window used to address the relationship question. All cases must be handled individually but the benefit of the doubt has tended to swing in favor of the student.

⁷²Ibid., 1217.

⁷³Ibid., 1216.

Doe v. Rockingham County School Board (Va., 1987)⁷⁴

An eight year old third grader was found to have a handicap **after** disciplinary action had been taken. This represented another variation on the theme that had not yet been addressed by any court but certainly not a rarity within the public school system. The behavior considered as a non-handicapped student was violent and disruptive for which he was immediately suspended pending an expulsion decision at the up-coming board meeting. A conference held with the parents immediately after the suspension resulted in reinstatement of the student in school. Two days later, similar behaviors necessitated suspension with expulsion again to be recommended to the board. The parent picked up the child and was told of the inappropriate behavior and suspension with the hearing scheduled for February 13. This was a 29 day suspension and considered by the court as having gone beyond the 72 hour rule established under Goss⁷⁵ for providing the parent with a hearing. Virginia's law permitted up to 30 days to be included in any suspension.⁷⁶ Therefore, the parent had cause for the court to have jurisdiction under 42 U.S.C. 1983 and under Goss analysis the child would have been irreparably harmed if

⁷⁴658 F. Supp. 403.

⁷⁵Goss v. Lopez, 419 U.S. 565.

⁷⁶Malone, 416.

required to wait until February 13 for the hearing.⁷⁷ The parents immediately had the child tested privately which resulted in the diagnosis of a learning disability. The school was notified of these results. The student remained out of school and was scheduled to be evaluated by school personnel. The student remained out of school until the testing was completed (agreement is not clear but there is some indication that home instruction was offered by the school but refused by the parent during this period). Following the testing, the student was reinstated in school following the decision of the IEP committee.

The court found the school district had violated the student's rights since no hearing was provided following the first suspension(considered by the court to be an expulsion because the time exceeded ten days). Also, the court found the district negligent in not returning the student to his current placement once it was determined that the student had a handicap and the "stay put"⁷⁸ provision applied.

The specific point in time in this case when protection of EAHCA was applied is significant but not made clear in the administrative record presented to the court. No additional testimony was taken to fill this factual void. The three possible points--when the private psychologist tested the child, when the public school initiated its

⁷⁷Ibid., 417.

⁷⁸20 U.S.C. § 1415(e)(3).

evaluation, and when the IEP committee determined eligibility and placement--are discussed but not indicated. Logically, the appropriate point is after the IEP committee deliberated and made their decisions. All private and public assessment considers eligibility but final determination cannot be made outside of the IEP committee.⁷⁹ The court's faulting the district for not applying the "stay put" rule appears erroneous but probably accurately portrays the type of misunderstanding that can quite easily occur when the court attempts to administer rather than monitor application of the law and accompanying regulations.

Honig v. Doe(California, 1988)⁸⁰

This landmark case represents action taken by the San Francisco Unified School District to expel two emotionally disturbed students whose behaviors were determined to be a result of their handicapping conditions. John Doe was a seventeen year old physically and socially awkward young man who had considerable difficulty controlling his impulses and anger. He was placed in a special school for the developmentally disabled. His IEP goals addressed the needs to improve his relationships with peers while also improving his ability to cope with frustrating situations without resorting to aggressive acts. His overall appearance and

⁷⁹34 C.F.R. 300.501.

⁸⁰108 S.Ct. 592.

mannerisms related to his handicapping condition made him a target for ridicule reportedly back as far as first grade. In November of 1980 John responded inappropriately to taunts and choked another special student leaving abrasions on the student's neck. On the way to the principal's office John kicked out a window. This behavior resulted in John being suspended for five days. The principal took this situation to the student placement committee which recommended that John be expelled. On the fifth day of suspension, mother was notified of the decision to expel and the decision to keep John out of school until the November 25th expulsion hearing could be completed. Protest was made to no avail. Parents filed and were granted injunctive relief. John was provided with homebound instruction and ultimately returned to school on December 15 which was five and one-half weeks (twenty-four school days) after his initial suspension.

The second student, Smith, was identified as emotionally disturbed in second grade in 1976. He was physically and emotionally abused as a child and demonstrated severe verbal and physical aggressive tendencies, particularly in relationships with peers and adults. He lived with his grandparents and in 1979 was placed at a learning center for emotionally disturbed students. In September of 1979, his placement was changed due to the grandparents' contention that he could do better in a regular public school. In February of 1980, his

placement was again changed to a regular middle school learning disability group with close supervision and highly structured environment for half days on a trial placement. The IEP noted that Smith was easily distracted, impulsive, and anxious which apparently justified the half day placement. The following school year he started a full day schedule at which time he began to deteriorate rapidly. By October, two meetings had been held with the grandparents with the recommendation to return him to half-day programs. Stealing, extortion of money from fellow students, and sexual remarks to female students resulted in his five-day suspension beginning November 14. His referral to the SPC team resulted in the team's recommendation for expulsion and extending his suspension indefinitely until the hearing was completed. Smith's counsel protested and two alternatives were provided--return to half days or homebound. Parents chose homebound which began on December 10. On January 6, 1980, an IEP team convened to discuss alternative placements. At this point Smith's counsel became informed about Doe's action and sought and obtained leave to join that suit.

The district court entered summary judgement in favor of Doe and Smith on their EAHCA claims and issued a permanent injunction. The district judge found that these boys had been deprived of their congressionally mandated right to a free appropriate education in accordance with

procedures established under EAHCA. What was significant here was that the characteristics of the deprivation--indefinite suspension and proposed expulsion for behavior which was attributable to their handicapping conditions. The judge then permanently enjoined the school district from taking any disciplinary action against a handicapped child if the behavior was handicap related. The judge did, however, permit continued use of the two and five-day suspension provision allowed under California statute. The judge also upheld the stay put provision by disallowing the school district to make any change in placement without parent permission pending completion of administrative and litigation proceedings. In other action, the court ordered the state to establish a compliance monitoring system or establish guidelines for local districts to follow when it was determined that the behavior was related to the handicapping condition. The state, under this order, could not make unilateral placement authorization and became responsible for providing direct services to students where it is determined that the local district was either incapable of or unwilling to provide required services.

At the time the Supreme Court granted certiorari, Doe was twenty-four and Smith was twenty. Based on the logic that there was a reasonable likelihood for this deprivation of such an important right to occur again, the Supreme Court agreed to hear and rule on the case. The context of this

decision which reflects the dissenting position by Justice Scalia is significant:

Although Justice Scalia suggests in his dissent, post, at 3, that school officials are unlikely to place Smith in a setting where they cannot control his misbehavior, any efforts to ensure such total control must be tempered by the school system's statutory obligation to provide respondent with a free appropriate public education in "the least restrictive environment," 34 CFR § 300.552(d) (1987); to educate him, "to the maximum extent appropriate," with children who are not disabled, 20 U.S.C. § 1412(5); and to consult with his parents or guardians, and presumably with respondent himself, before choosing a placement, §§ 1401(19), 1415(b). Indeed, it is only by ignoring these mandates, as well as Congress' unquestioned desire to wrest from school officials their former unilateral authority to determine the placement of emotionally disturbed children, see *infra*, at 15-16, that the dissent can so readily assume that respondent's future placement will satisfactorily prevent any further dangerous conduct on this part. Over-arching these statutory obligations, moreover, is the inescapable fact the preparation of an IEP, like any other effort at predicting human behavior, is an inexact science at best. Given the unique circumstances and context of this case, therefore, we think it reasonable to expect that respondent will again engage in the type of misconduct that precipitated this suit.⁸¹

The Court reasoned that the lack of uniform procedures throughout the state to handle cases where the handicapping condition is related to misconduct that the same result would occur regardless of what district Smith, Doe, or any other emotionally disturbed child was enrolled. Likewise, with the state petitioning to support continuation of their position, such action and disposition of cases would

⁸¹*Ibid.*, 604-605.

continue to deny handicapped children of the educational right they are mandated to receive.

It is extremely important to note here that the Court was dealing with the issue of conduct which was related to the handicapping condition and the district's request was to exclude such children because of their behavior. History and intent of the legislation seemed clear on this issue and was defended and upheld by the Court:

The language of Section 1415 (e)(3) is unequivocal. It states plainly that during the pendency of any proceedings initiated under the Act, unless the state or local educational agency and the parents or guardian of a disabled child otherwise agree, "the child shall remain in the then current educational placement." Faced with this clear directive, petitioner (school officials) asks us to read a "dangerousness" exception into the stay-put provision on the basis of either of two essentially in-consistent assumptions: first, that Congress thought the residual authority of school officials to exclude dangerous students from the classroom too obvious for comment; or second, that Congress inadvertently failed to provide such authority and this Court must therefore remedy the oversight. Because we cannot accept either premise, we decline petitioner's invitation to re-write the statute.

Petitioner's arguments proceed, he suggests, from a simple, common-sense proposition: Congress could not have intended the stay-put provision to be read literally, for such a construction leads to the clearly unintended, and untenable, result that school districts must return violent or dangerous students to school while the often lengthy EAHCA proceedings run their course. We think it clear, however, that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did,

however, deny school officials their former right to "self-help," and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a late resort, the courts.⁸²

The Court made it clear that, after extensive review of the history, the legislature recognized the significance of exclusion, the importance of education for all, the need for schools to be safe, and the importance of parent input all towards insuring that no singular group of students or individual student was inappropriately denied the right to an education. It applied this information and reasoned:

Congress attacked such exclusionary practices in a variety of ways. It required participating states to educate all disabled children, regardless of the severity of their disabilities, 20 U.S.C. § 1412(2)(C), and included within the definition of "handicapped" those children with serious emotional disturbances. § 1401(1). It further provided for meaningful parental participation in all aspects of a child's educational placement, and barred schools, through the stay-put provision, from changing that placement over parent's objection until all review proceedings were completed. Recognizing that those proceedings might prove long and tedious, the Act's drafters did not intend § 1415(e)(3) to operate inflexibly, see 121 Cong. Rec. 37412 (1975) (remarks of Sen. Stafford), and they therefore allowed for interim placements where parents and school officials are able to agree on one. Conspicuously absent from § 1415(e)(3), however, is any emergency exception for dangerous students. This absence is all the more telling in light of the injunctive decree issued in PARC, which permitted school officials unilaterally to remove students in "extraordinary circumstances." 343 F. Supp., at 301., Given the lack of any similar exception in Mills, and the close attention Congress devoted to these "landmark" decisions, see S. Rep., at 6, we can only conclude

⁸²Ibid., 607-608.

that the omission was intentional; we are therefore not at liberty to engraft onto the statute an exception Congress chose not to create.⁸³

The Court, sympathetic to the responsibilities of school officials to keep schools a safe environment for learning, did not see schools left without recourse. The Court reasoned:

Our conclusion that § 1415(e)(3) means what it says does not leave educators hamstrung. The Department of Education has observed that, "while the [child's] placement may not be changed [during any complaint proceeding], this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others." Comment following 34 CFR § 300.513 (1987). Such procedures may include the use of study carrels, time-outs, detention, or the restriction of privileges. More drastically, where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 school days. This authority, which respondent in no way disputes, not only ensures that school administrators can protect the safety of others by promptly removing the most dangerous of students, it also provides a "cooling down" period during which officials can initiate IEP review and seek to persuade the child's parents to agree to an interim placement. And in those cases in which the parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10-day respite gives school officials an opportunity to invoke the aid of the courts under § 1415(e)(2), which empowers courts to grant any appropriate relief.⁸⁴

The Court addressed the stay-put provision and issue of state obligation to provide where local districts are unable to do so. The issues related to students whose behavior was

⁸³Ibid., 608-609.

⁸⁴Ibid., 609-610.

related to the handicapping condition. The Court let stand the lower court's ruling that if no relationship exists then the student can be disciplined the same as any other children. This is very significant. Also, the court did not address whether an evaluation of a handicapped child's needs must be made before a significant change can be made in the child's current program or services provided.

Summary

It is well settled that an aggrieved, eligible party under P.L.94-142 can litigate the matter after exhausting, in most cases, administrative remedies. Also, it is quite clear that rules and regulations to implement the statute serve as the bedrock and true test to insure that a child with a handicap is eligible, identified, appropriately evaluated, and provided with appropriate educational programs and related services. Despite these assurances and guarantees being in existence for fifteen years and twelve federal court interpretations related to the issue, nothing specifically identifies expulsion as a disciplinary option or how it is to be managed for the child with a handicap.

The minimal number of federal court cases associated with the enforcement and interpretation of this issue covers a full range of handicapping conditions and focuses primarily on high school aged students. This broad spectrum of application demonstrates consistent application of the rules as criteria but differences in net effect. The courts

acknowledge the travesty that has occurred in the past affecting the opportunity for the handicapped to be educated and have advocated for the handicap through rigorous enforcement of the statutes implementing regulations and removing the past unchecked authority to exclude children from school. The courts also have acknowledged the responsibility for maintaining a safe school environment for all children is the schools and an area that the courts should stay out of as much as possible.

Thus the open-endedness remains in several areas related to disciplining handicapped students. Use of history, logic, and reasoning influenced by the courts can provide a sound basis for policy and procedures which all districts should have established for dealing with the critical issue of disciplining of all students including handicapped students. That time period between notice of when and how discipline is applied has been the critical time period for schools to act while respecting established rights of students. The determination by a special professional team of the relationship between inappropriate behavior and handicap appears to be the consistent, major difference between applying disciplinary procedures to all children. Existing procedures are established by P.L. 94-142 and its implementing regulations. However, there remains a need to clearly establish a non-discriminating disciplinary system for all students. Contentions are made

that dual disciplinary systems still exists. Sound policy development is needed to avoid these dual systems and inappropriate treatment of students whose behavior is a result of their handicap. A fairness can exist while allowing all children the opportunity to receive an appropriate education.

Chapter IV

CASE STUDIES--TWO LARGE UNIT DISTRICTS

Introduction

By reviewing the literature and analyzing court decisions on the topic of expulsion of handicapped children, considerable value is obtained for developing a historical perspective and basis for policy development. This is particularly relevant to the issue of expulsion of handicapped children since expulsion represents a disciplinary act not sanctioned or directly addressed by the statutes or regulations placing heavy reliance on interpretation and locally determined implementation.

Similarly, sharing of knowledge and accounting of history through written accounts of practices and interpretations become instructive and helpful to avoid reinventing the wheel and experiencing many problems already encountered by others. Formulation and application of policy also become instructive because of the historical value of past practice, comparison of how consequences were then and are now perceived, and what, if any, were the major factors influencing policy development and change. In this chapter, policy development and application of procedures for using expulsion as a disciplinary measure with

handicapped children was studied in two school districts to gain an additional historical perspective.

The two large school districts (over 25,000 students) were studied for their development, application, and evaluation of policy as it pertained to expulsion of handicapped children. They were chosen because of their location within different federal jurisdictions, and, as a result, requirement to follow different rulings prior to *Honig v. Doe*. Large districts were selected to obtain a wider, broad based application of statutes, rules, and policy development which have occurred within the first fifteen years since the passage of the historic P.L. 94-142.¹ Formal advocacy, often a major force in special education policy, generally develops more rapidly in larger population segments. Resources are also considerably greater and varied, and therefore, more programs and services are available within a comprehensive continuum of programs and services. Larger systems seem to have initiated programs and services to a greater degree than most before passage of P.L.94-142. As a result the policy development history was, as anticipated, rich and reflective of local attitudes which added to the instructive nature of this inquiry of policy development.

¹November 29, 1975 was the historic date that President Gerald Ford signed P.L. 94-142 into law.

School District U-46²

School District U-46 is the second largest unit school district(behind Chicago) in the State of Illinois. School District U-46 is under the jurisdiction of the 9th Federal Circuit Court of appeals. U-46 serves more than 27,000 students in pre-kindergarten through twelfth grade. Special Education programs and services are provided to all eligible children ages three through twenty-one. The district is located forty miles northwest of Chicago and includes sections of Kane, Cook, and DuPage counties. This large school district encompasses ninety-two square miles and includes the communities of Elgin, South Elgin, Bartlett, Wayne, Streamwood, and portions of Hanover Park, West Chicago, Carol Stream, and St. Charles. Students in the district attend thirty-one elementary schools, six middle schools, three high schools, and three special education schools. The school district was serving 3507³ handicapped children and youth.

U-46 Expulsion Policy

The current School District U-46 policy for expulsion of students was developed and has evolved to insure compliance with all state and federal statutes. In 1975, with the passage of Public Law 94-142, the Education of All

²Elgin Unit School District No.46, 355 East Chicago Street, Elgin, Illinois, 60120.

³December 1, 1989 Federal Child Count.

Handicapped Childrens Act, special precautions were built into the guidelines and procedures to insure consideration of a student's defined handicapping condition relative to the unacceptable behavior prior to exercising disciplinary measures of suspension and/or expulsion from school. The policy has withstood the scrutiny of due process hearings, state audits and evaluations, and investigations by the Office for Civil Rights.

Current Policy Statement

The board of education policy on Student Expulsion was last revised and approved by the District U-46 Board of Education in November, 1985. It reads:

JGE--Expulsion

Pursuant to the provisions of the Illinois School Code, the Board of Education may expel a student found guilty of gross disobedience or misconduct for a period up to, but not to exceed, the remainder of the current school year. Expulsion of a student shall occur only after the parents/guardians have been requested to appear at a meeting of the Board of Education in closed session. The Board of Education shall hear the evidence presented at any such meeting. The school shall offer carefully determined remedial recommendations for the parents/guardians and the student. A written, documented summary of school efforts that have been taken shall be submitted to the superintendent prior to a recommendation for expulsion to the Board of Education. Upon considering all facets of the case, the Board of Education may take whatever action it shall find appropriate in accord with its policies and rules, administrative rules and regulations, and the guidelines set forth by the Illinois State Board of Education.

Expulsion shall be exercised only after remedial efforts have failed or when a student's disturbance becomes a serious impediment to the

student's welfare or school operations. (Illinois School Code, 10-22.6)⁴

This 1985 revision differed from the 1975 policy only by leaving out the initial paragraph which read:

The schools and programs of District U-46 have been designed to foster and to strengthen the capabilities and potentialities of students with respect to learning and life. Denial of school attendance shall be exercised only after remedial efforts have failed or when a student's disturbance becomes a serious impediment to oneself or to the school operations.⁵

The very general nature of the board policy was intentional permitting administrative flexibility and opportunity for change without having to continually go through the Board of Education.⁶ However, all major changes are cleared through the board. Minor changes in procedure, as they occur, are provided to the board on an information only basis with opportunity for input and further action if needed.⁷

The current policy is implemented using procedures developed from a broad base of administrative input and are included in the District Administrative Procedures Handbook, under "Administrative Guidelines for Student Suspension and

⁴School District U-46, Policy Manual, "JCD Expulsion" Section J, (revised 1985), 12.

⁵School District U-46, Policy Manual, "JCD Expulsion," Section J, (1975), 12.

⁶Personal interview with school superintendent Dr. Richard Wiggall, June 15, 1989.

⁷Ibid.

Expulsion." The board policy and procedures were originally developed and continue to be revised to provide legal grounds for the disciplinary measures needed by the Board of Education for maintaining appropriate student behaviors and environment for learning.⁸

Historical Review of Policy Development Since 1975

This historical review focused primarily on the revision and direct application of the expulsion policy to student's with handicaps.

A procedural modification requiring notification of the Illinois Department of Mental Health and Developmental Disabilities whenever suspension or expulsion of a student where there is evidence that mental illness may be a cause for such expulsion or suspension became effective on March 4, 1975.⁹ This interagency communication directive from the Department of Mental Health was intended to provide the district with consultation and observation services as requested to assist local school districts. This was the only significant change in procedure for ten years. Just prior to this change, rules and regulations governing due process for all suspension and expulsion proceedings were to be promulgated by the Illinois Office of Education as a

⁸Ibid.

⁹Division of Legal Services, Illinois Department of Mental Health & Developmental Disabilities, "Memo to Regional Administrators and Superintendents re: Suspension and Expulsion Consultation," December 19, 1975.

result of the *Goss v. Lopez* decision.¹⁰ Section 4-33.8 of those proposed Regulations were applicable to the handicapped:

- 4-33.8 a. A student may not be expelled for behavior which is or results from a handicap defined in Illinois Revised Statutes, 1973 Chapter 122, Sections 14-1.01 through 14.107 and the Rules and Regulations to Govern the Administration and Operation of Special Education.
- b. A student may be suspended for behavior which is or results from a handicap defined in Illinois Revised Statutes, 1973, Chapter 122, Sections 14-1.01 through 14-1.07 and the Rules and Regulations to Govern the Administration and Operation of Special Education, if as a result of the behavior the child is a direct physical danger to himself, other students, faculty or school property.
- c. If evidence is presented during an expulsion or suspension proceeding which indicates that the student's behavior is symptomatic of, or results from, a handicap as defined in Illinois Revised Statutes, Chapter 122, Sections 14-1.01 through 14-1.07 of Illinois Revised Statutes and Rules and Regulations to Govern the Administration and Operation of Special Education, the student shall be referred for special education evaluation pursuant to the Rules and Regulations to Govern the Administration and Operation of Special Education.¹¹

These proposed rules were viewed as a zero reject model which would not allow for any student to be expelled but to receive an alternate program through special education.

¹⁰*Goss v. Lopez*, 95 S.Ct. 729 (1975).

¹¹Joseph M. Cronin, Illinois Office of Education, Letter to Superintendents dated July 30, 1975, seeking their input into proposed "Rules and Regulations for the Suspension and Expulsion of Students."

statewide, regular and special education administrators opposed these regulations as requiring unnecessary testing and meetings leading to the dropping of section c.

History of Procedure Development Since 1975

The implementation of PL 94-142 created the need for major changes in state statutes, rules and regulations, and local policy and procedures. Appropriations accompanying this legislation was and continues to be inadequate. District U-46 was also facing a critical financial posture at this time. State and local dollars were becoming insufficient to sustain the level of programs and salary increases proposed by the strong local teachers union. Regular program and staff reductions were taking place at the same time as extra work loads, policy revisions, and staff additions were being implemented in special education. Any staff added had to be paid fully by the new federal dollars. The district opted not to use state reimbursement (requires up-front local dollars initially) to maximize all funding sources. The ill effect of the polarization which occurred at this time still lingers.

Added to this stressful incubation period for policy revision and development were two new groups--advocates and the Office for Civil Rights. These informal and formal pressure and enforcement groups heightened the anxiety of staff yet served to expedite the development of policy and

procedures which were fully compliant with state and federal statutes and regulations.

Limited formal research was used in the development of the initial policy. State consultation to a group of principals and special education administrators served as the primary source of information.

Significant Actors/Participants/Groups

The situations and circumstances of due process hearings and investigations actually served as incentives which unified and provided shared motivation to work towards proactive positions rather than reactive. Principals were extremely reluctant to change and move towards all new, time consuming procedures and endless paperwork. Staff, while for the most part understanding of the basis and need for change, were also reluctant to accept transition.

The transition from limited formal rules and compliance to total rules and full compliance naturally found a rich and bountiful population for advocates to feed on and declare that "services were not provided" and students were not being "appropriately" served--no IEPs (Individual Educational Programs) existed because they were a new requirement of the law. Through extensive participation in due process hearings by principals and staff the word spread quickly of the need for compliance. Staff and principals recall this as a "bloody" battle yet very productive.

As problems intensified and private attorneys started representing parents, School Board attorneys began to assist school administration. In the Fall of 1982, two advocates, having attended the same training sessions together, began to request due process hearings and, at the same time, filed complaints with the Office for Civil Rights (OCR). With the enforcement power of this agency looming overhead and the possibility of losing federal dollars, a second wave of "testing" began to take place. This was also the crisis point of local financial problems and the Board decision to work to pass a referendum added a new dimension to the overall situation. By now, however, the district's policies and procedures were fully implemented and fresh from success in defense of its actions in due process hearings. The superintendency changed hands the year before placing the district in a new direction with the internal goal to pass the referendum and make U-46 a school district "where good things are happening in education"--the new district slogan. Compromise, low profile, limited confrontation, and proactive efforts were the order. The district asked OCR to come in to consult and develop a fully compliant procedure related to suspension and expulsion of handicapped students. This invitation followed the entering into assurance statements prematurely with that office to resolve disputes without having to go to full investigations. This may also have been the result of the new organizational

structure proposed, approved, and implemented by the new superintendent. Agreements were negotiated and many decisions with outside agencies were made without the consultations and prior involvement of key district staff. The district also involved the State Board of Education at this same time in the planning and implementation of a series of conflict resolution workshops.

As the advocates began to meet stronger resistance (full compliance, willingness to work with parents by district staff, resolution of complaints, and successful due process decisions upholding the districts position, they attempted a negative media blitz. To the advocates' disadvantage, they made false accusations and claims, which, after the impact of bad press and headlines, the district survived nicely and actually gained media support. One maverick paper, a weekly, continued to blitz the community with horror stories which were totally false. Resolution was reached eventually between the district and the paper by skilled negotiations of the new superintendent in the shadow of the impending referendum. The financial condition of the district continued to worsen and resulted in another reorganization within the district.

Process of Implementation

A wide cross section of principals, teachers, special education administrators, and central office staff went on a retreat to Northern Illinois University in DeKalb, Illinois

to develop the process for building service team meetings (teams existed but were informal and building run which resulted in thirty-two different procedures) and to determine how the team would deal with disciplinary matters. The guidelines and procedures currently used are a direct result of that retreat. After the retreat, the procedures were reviewed by the various groups, revised slightly, and formally adopted by the Board of Education. Retreat members then, in teams, went around and provided inservice to all buildings with special sessions held for team members. The one evident negative factor even after this involvement was a continuing, polarization between regular and special staff--not as strong as before yet still apparent. All seemed to understand the need to comply with rules and regulations and were able to see some benefits from the confrontations and other tests. Despite these feelings regular and special staff still resented the additional work and extra special treatment "afforded a few."

District files and records are extensive but only refer to suspensions including annual summaries of all students suspended with tallies taken by grade, sex, race, number of days and reason for the suspension. Each annual summary was compared to the previous years statistics. No records were available on the number of expulsions from any of the three district high schools

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Revised Procedures

The 1985 revision of procedures created a disciplinary step system to facilitate a positive, constructive, easily understood model for parents and students to relate to and develop an appreciation for the seriousness of various acts of misbehavior and resulting consequences. This system is included in the calendar/handbook published and distributed each year to students and their parents. The student handbook serves a double purpose: Any time a parent in special education (generally with the advice and direction of an advocate) wanted to confront district decisions or develop an adversarial position for negotiations they would contend that they never received this information or that they never received it each year. The calendar/handbook served as an excellent public relations media communicating many positive events and information while documenting that the disciplinary information was disseminated each year.¹² This information continues to be given to all students and parents when registering or entering school for the first time each year.

Under the disciplinary step system, misbehavior resulted in consequences which are both current and cumulative. Emphasis was placed on consequences that were meaningful and based on the assessment of the individual

¹²Interview with former Deputy Superintendent H. Eisner, June 8, 1989.

setting and the desire of the board and administration to meet with the parents and work to resolve problems at the earliest possible time. At the extreme end of the system, the ultimate consequence occurred when the student reaches step 25 and became eligible for expulsion. However, a positive, self correction/redeeming mechanism was also included within the system permitting the reduction of one step for every ten school days that no disciplinary offense had occurred. Steps are determined by building administrators. Often times, many other staff contributed to the final determination as to the level of discipline provided. This worked in a decidedly student advocacy orientation and allowed staff who ultimately got the student back to have some say in the final determination. The school service team also became involved when a special education student was being disciplined to insure that the final strategy was consistent with the total plan developed for that student. This involvement of the team was also considered part of the monitoring activity for the cumulative ten day suspension limit agreed to under assurances submitted to the Office for Civil Right. Parents are not involved in this meeting process but are kept informed by the student's teacher. As a guide, the following steps were defined with accompanying examples of the inappropriate behavior which resulted in movement through the log:

<u>Steps Defined</u>	<u>Examples</u>
<u>1 Step</u> - A student will advance 1 step for an offense that results in a warning but not a suspension.	Cutting in lunch line; Not bringing materials to class; Non-possession of a student I.D. card; Dishonesty in school affairs; excessive tardies.
<u>5 Steps</u> - A student will advance 5 steps on the scale and be suspended from school.	Second referral for 1 step violations; Minor vandalism and theft; for actions which violate a code of conduct as outlined in the student handbook under Student Rights and Responsibilities.
<u>17 Steps</u> - A student will advance 17 steps and be suspended from school for offenses more serious in nature which risk the health and well being of other people in the school or interfere with the normal operation of the school.	Fighting; Insubordination; Possession of drug paraphernalia; Leaving assigned areas without permission; Motor vehicle and bus violations; Unsafe or disruptive dress; Substance abuse
<u>20 Steps</u> - A student who collects 20 steps may be referred to Alternative Education.	Resisting staff intervention in a student fight; Major vandalism; Threatening a staff member; Fake fire alarm; Possession of weapons;
<u>25 Steps</u> - A student who collects 25 steps will be recommended to the Board of Education for expulsion.	Inciting others to violence or major group disturbance; Second referral for most 5 step offenses;

Certain offenses will
lead to an automatic
request for expulsion.

Inciting a racial
disturbance; Selling a
controlled substance;
Physical attack of an
employee of the school
district;
Posing a major threat
to the health and
welfare of the student
body or school
employees;
Other felonious
offenses;
Second referral for
most step 17 offenses;

Application to Students with Handicaps

This procedure was determined to be applicable to handicapped children only after consideration by the school service team to determine if the behavior was related to the handicapping condition. If there was such a relationship, a multidisciplinary staff conference--which included the parents--was convened to consider changes in the student's program and no suspension or expulsion could occur. If the school service team determined that no relationship exists, suspension and expulsion applied as it would apply to any regular student.

Evaluation Based on *Honig v. Doe* Decision

This procedure was tested on January 20, 1988. The Supreme Court ruled on a case involving suspension and expulsion of special education students.¹³ The case, *Honig v. Doe*, addressed the "stay put" rule requiring students to

¹³Honig v. Doe, 108 S. Ct. 592 (1988).

remain in their current placement pending outcomes of procedural safeguards and/or litigation. If parents and school can not agree on an interim alternative placement, schools must go to the court and convince the judge of the impending danger of staying the current placement. Schools alone can no longer exclude students on their own judgment of a danger to self or others.

Current Policy Evaluation--Process

A proposal for a needs assessment and evaluation of existing policies and procedures and possible revision was cleared through the area superintendent who chaired meetings of high school principals for consideration by the high school principals in February 1988 and submission to the Superintendent by the end of the 87-88 school year. The approved process involved surveying high schools and special education program supervisors relative to the current practice and procedures as they were actually implemented. Follow-up interviews were then conducted with deans, assistant principals, and special services coordinators from each high school, special education supervisors, the assistant and director of special education, and the special education communication committee (representatives of teaching and support staff from all areas in special education). Additional phone interviews were conducted with special staff who had been most affected and/or most concerned about the current policy. The results of the

needs assessment was provided to the high school principals leading to recommendations and planning for implementation and follow up:

Findings

All staff were aware of the need for consideration of the student's handicap relative to the inappropriate behavior prior to using suspension or expulsion as a disciplinary measure.

This requirement was felt to be a beneficial safeguard to the student. Two staff members felt it was so beneficial that the district should consider the modification of our treatment of regular students in the same fashion.

While perceived as a benefit, staff members also saw the current system as separate and apart from the normal procedure, thus giving special education students preferential treatment. The term "dual system" was referred to readily by all individuals and groups.

Almost all staff members commented on the negative effect this apparent double standard has on the students. Special education students regularly acknowledged that the system can't do anything to them because they are handicapped. Special education teachers attested to this testimony while deans and assistant principals referred to it as "bragging" on the part of the special education students.

The majority of suspensions evolved from accumulation of non-compliance with other disciplinary measures-- especially non-attendance of detention and Saturday school assignments. Normal disciplinary measures of detention and Saturday school resulted from tardies, in-school truancy, and other minor offenses. Confrontation with these disciplinary measures occurred frequently and, depending on the school, may have resulted in dismissal for the day or week, or return only when a parent accompanied the student.¹⁴ This was the point in time when some students would acknowledge that nothing would be done to them because they were in special education.

Staff were irregularly involved in the service team process where the behavior was considered relative to the handicapping condition. Sometimes phone calls were made in lieu of attendance at the service team meetings.. Sometimes staff were asked to sign a staffing sheet where a meeting had taken place without them. Incidents of students being sent home without notification to teachers were reported.

In situations where major offenses occurred, the procedure was generally followed very closely with appropriate notification, time-lines, meetings, consideration of handicap, and involvement of parents and all staff.

¹⁴These alleged practices were unwritten, informal practices, occasionally used.

The number of cumulative days was monitored very closely.

Deans were very flexible and considerate in all cases where any special consideration was requested by staff.

There was a great deal of discrepancy between how the policy was implemented in each of the three high schools.

Only one building administrator was involved in the original development of the policy.

While all administrators interviewed had an awareness of the policy, only two high school administrators responsible for implementing the policy had received in-service of any kind on the implementation process.

No building conducted any kind of evaluation or review of the implementation of the policy annually.

No orientation was given to staff by building administrators relative to this policy.

Conclusions:

Major problems were evolving out of uncontrolled minor problems. The minor problems led to detention and Saturday school which led to greater number of days of suspensions which, in turn, appeared to cause compromising of the system and inconsistent application. No one wanted to go through all the hassle of expelling a handicapped child for accumulation of minor offenses. Good intentions and understanding were potentially creating a negative backlash.

A dual system existed in the minds of regular staff and

students, special education staff and special education students, and building administrators.

Recommended Changes

The district's current policy remained in full compliance after the school board attorney recommended the inclusion of the procedure to seek an injunction in the event that agreement could not be reached with parents for an alternative placement for a student during administrative remedy or litigation--the major change as a result of the *Honig v. Doe* decision.

Comparison of policy development of two different school districts in two different states was intentional to reflect how systems respond to court rulings. For example, *Honig v. Doe* is significant to both as it is a Supreme Court ruling. *S-1 v. Turlington* is binding on Florida and other states within the 5th circuit which does not include Illinois. As a court of appeals decision, it is only directly applicable to the 5th circuit yet instructive in others as can be seen by the review of literature and analysis of all court decisions.

Hillsborough County Public School System¹⁵

Hillsborough County, Florida is one of sixty-seven districts in Florida and is the 12th largest school district in the nation. K-12 enrollment in the Hillsborough system

¹⁵Hillsborough County Public Schools, 411 East Henderson Avenue, Tampa, Florida, 33602-2799.

is 123,053.¹⁶ The Hillsborough unduplicated special education child count as of December 1, 1989 was 15,936.¹⁷ The special education population in the Hillsborough County public school system was reported to be increasing at a greater rate than regular education for the past several years. Hillsborough County is under the jurisdiction of the 5th Federal Court of Appeals.

Hillsborough County Disciplinary Policy

In Hillsborough County the board of education's disciplinary policy did permit expulsion of students but not complete cessation of educational services.¹⁸ This was viewed as very significant as it exemplified the commitment to education for all children. Truancy and drop out prevention programs developed in the past two years also demonstrated an active role and firm commitment to serve and provide education for all children. Hillsborough had a full time hearing master and sophisticated grievance procedure under their affirmative action program. In reality, no student was expelled from education in Hillsborough County. Placements were changed. If the act is severe enough, such as firearm possession and/or possession or use of drugs, the

¹⁶Updated as of January 4, 1990 taken from the "Pupil Membership Summary Report, SD4205A," January 11, 1990, 1.

¹⁷DEES Program Enrollments, unduplicated Child Count for P.L.94-142, taken Dec. 1, 1989.

¹⁸1989-90 Hillsborough District, Special Education Procedures and Compliance Manual, 207.

student was prosecuted under the law. Otherwise, the placement was changed after a thorough hearing with the parents and all school and community staff involved.

While not used by the Hillsborough County Schools, an exclusion clause remained intact under current Florida statutes.¹⁹ This exclusionary clause permitted exclusion with certification from physicians or qualified psychological examiners "any child whose physical, mental, or emotional condition is such as to prevent his successful participation in regular or special education programs for exceptional children."²⁰

The reference to expulsion in their rules referred to a district recognition of expulsion as a change of placement. Expulsion of a handicapped student was defined as:

Removal from one program to an alternative program and not exclusion from a free appropriate education. An alternative program in this context is that educational programming identified under the heading of Exceptional Education Assignment on the IEP.²¹

Therefore, when "expelled" in Hillsborough, the net result was merely a change in placement. As with any district, the challenge to meet individual needs created the

¹⁹State of Florida Department of Education, A Resource Manual for the Development and Evaluation of Special Programs for Exceptional Students, Vol. 1-B, 232.06 (1989), 20.

²⁰Ibid., 20.

²¹Hillsborough District, Special Education Procedures, 207.

need and challenge to offer a wide range of alternatives. Hillsborough had done just that and continued to look for ways to improve upon what they were already doing. Full time alternative placements for specific learning disabilities, speech, and all other special education categorically labeled special education students with the exception of seriously emotionally disturbed and behavior disordered (referred to as educationally handicapped) are available in alternative education programs funded through the drop out prevention program.

Florida Funding of Special Education

The question was often raised in the literature as to how programs are funded within the Turlington jurisdiction when the students aren't expelled since services are not terminated. District officials explained that all of the program options are included under the Florida Education Finance Program (FEFP), a weighted per pupil funding system, with full time equivalent's (FTE's) being calculated for the respective programs. Therefore, all students, despite their programs being modified, continue to be served and the district continues to receive funding. However, as the options continue to develop, costs are reported to dramatically exceed revenues. For example, a new alternative, a diagnostic class, was being developed. This represented a commitment of a teacher and a high level of support services of psychologists, social workers and

others. The student continued to generate funding under the initial qualifying category, but now the teacher pupil ratio was smaller, support services were increased, and often classroom space became added expenses. Dollars were generated only for direct instruction; therefore the valuable support services added became very costly but very necessary because of the individual needs of the child.

Also, an exceptional child of a high index²² may be placed in another program with a smaller index. For example, an EMH student may be moved to alternative education because of the need for change in placement and also because the alternative education teacher was dually certified in EMH. Here the direct instruction in alternative education and the funding source index was lower yet the child was receiving an appropriate education.

Funding Comparison with Illinois

Funding in Florida was significantly different than in Illinois. Illinois provided funding through reimbursement levels of \$8,000 and \$2800 per approved certified and non-certified employee respectively hired to serve handicapped children. Other sources of funds were provided on a complex formula basis for supporting students placed in private schools and in local programs requiring concentrated support

²²The numerical figure multiplied by the cost of educating one regular child; e.g. a BD student--student teacher ratio 8:1 and receiving social work service--may be indexed at 5.42. Aide for a regular student is \$2,000 and this BD student \$10,840 (5.42 X \$2,000).

services and low teacher pupil ratios. Additionally, Illinois included all handicapped child in the average daily attendance formula which was used to generate state aide for regular education. Florida used weighted indexes for all levels of instruction with the base, or index of one, being determined by the cost of educating students in grades 4,5,6,7, and 8. The basis for the model and intent of the law was found in the philosophy statement incorporated within the states financial plan²³:

To guarantee to each student in the Florida public school system the availability of programs and services appropriate to his/her educational needs which are substantial equal to those available to any similar student notwithstanding geographic differences and varying local economic factors.

To provide equalization of educational opportunity in Florida, the Florida Education Finance Plan (FEFP) formula recognizes (1) varying local property tax bases, (2) varying program cost factors, (3) district cost differentials, and (4) differences in per student cost for equivalent educational programs due to sparsity and dispersion of student population.

The key feature of the finance program is to base financial support for education upon the individual student participating in a particular educational program rather than upon the numbers of teachers or classrooms. FEFP funds are primarily generated by multiplying the number of full-time equivalent students (FTE) in each of the educational programs by cost factors to obtain weighted FTE's. Weighted FTE's are then multiplied by a base student allocation and by a district cost differential to determine the state and local FEFP funds. Program cost factors are determined

²³"Florida 1989-1990 Education Finance Program," Statistical Report, Florida Department of Education, Division of Public Schools, MIS Series, August, 1989, 1.

by the legislature and represent relative cost differences among the FEFP programs.²⁴

Effects of S-1 v. Turlington

In September of 1981, the Bureau of Education for Exceptional Students of the State Department of Education issued a technical assistance paper to assist school districts in revision of their policies and procedures related to disciplining of handicapped students in situations where their behavior was disruptive to the education of others.²⁵ This initiative was in response to a January 26, 1981 decision by the 5th Circuit Court of Appeals in the *S-1 v. Turlington* decision which dealt with procedures used by local school districts to expel handicapped students. The *S-1* decision was a Florida case which required, by injunction, that all state officials enforce all provisions of the order. Special emphasis was obvious in this order that gifted were not included since the EAHCA (P.L. 94-142) and Section 504 of the Rehabilitation Act were the authority for the decision. Neither authority encompassed the gifted in statute or regulations.²⁶

²⁴Section 236.012(1) Florida Statutes.

²⁵State of Florida, Department of Education, Bureau of Education for Exceptional Students, Expulsion and Handicapped Students, Technical assistance paper distributed to all Florida School Districts following the *S-1 v. Turlington* decision, 1-35, September, 1981.

²⁶*Ibid.*, 5.

All placement decisions were required to be made by persons knowledgeable about the child, the meaning of evaluation data, and placement options. If the behavior was determined to be a manifestation of the handicap, an IEP meeting must be held to consider the adequacy of the current program and related services. If no relationship exists, a student may be expelled following regular district procedures but cessation of educational services may not take place. The nature and degree of placement alternatives were discussed and considered as options available when placements needed to be changed. The regular code of conduct continued to apply to handicapped children. Emphasis was placed on considering both in-school and out-of-school behaviors in the IEP meeting and getting parents involved in the total program. All procedural safeguards normally available to parents continued to be available in disciplinary situations.²⁷ Suspension, defined as removal of a student for a period not to exceed ten days, was not considered a change of placement. Avoiding multiple suspensions was recommended as anything beyond ten days can be considered expulsion or a change in placement. Formal evaluation prior to a change in placement was not required but recommended. This recommendation may also be made in an IEP meeting, three year reevaluation, when district was considering a change in placement, or parent requested and

²⁷Ibid., 5,7-12.

district agreed. Finally, the stay put rule took place unless parent and school agreed on another placement.²⁸

In October, 1981, the Florida State Board of Education amended Rule 6A-6.0331, FAC to read:

- (7) Discipline. The school board shall establish policies and procedures for the discipline of a handicapped student and for informing a handicapped student's parent or guardian of the policies and procedures for discipline. Such policies and procedures shall include provisions for expulsion, which is a change in placement invoking the procedural safeguards ensured for individual educational plan meetings, staffings, and change of placement provisions in accordance with Rule 6A-6.0331(3) and 6A-6.03311, FAC. Where the student's behavior could warrant expulsion consistent with the district's policies, the following provisions shall apply:
- (a) A staffing committee shall meet to determine whether the misconduct is a manifestation of the student's handicap. The membership of the staffing committee shall be in accordance with requirements of Rule 6A-6.0331(2), FAC.
 - (b) If the misconduct is a manifestation of the student's handicap then the student may not be expelled; however, a review of the individual educational plan shall be conducted and other alternatives considered.
 - (c) If the misconduct is not a manifestation of the student's handicap then the student may be expelled; however, any change in placement shall not result in a complete cessation of special education and related services.

Revision of Policy--Solve, Not Create Problems

²⁸Ibid., 5, 12.

From this assistance provided by the State Board of Education, the Hillsborough County Public Schools proceeded to revise its existing expulsion policy along with a sophisticated hearing and conflict resolution network that quickly worked to resolve problems:

Procedure: (SEBER 6a-6.341(6))

1. Area Directors will call the General Director of the Department of Education for Exceptional Students (DEES) when a student is recommended for expulsion. The DEES General Director or his designee will call the Area Director the same day and indicate whether or not the student is currently receiving DEES services or if the student has been known to DEES in the past.
 - A. If the student has never been in a DEES program further DEES involvement is not necessary. A referral by the Area Director of the Department of Student Services (DoSS) should be made.
 - B. If the student is not receiving DEES services but has in the past, a memo will (be) sent from the DEES General Director or designee to the Area Director summarizing the type of DEES service the student received and the date the service was provided.
2. The DEES General Director will transfer the Expulsion Hearing to the Supervisor DEES Staffing Component, who will be responsible for the following procedures in their entirety. This process will be completed prior to the School Director submitting required documentation to the School Board to substantiate the request for an expulsion hearing.
3. The Supervisor DEES Staffing Component, will assign a staffing specialist to gather data on the student recommended for expulsion.
 - A. The assigned staffing specialist will:
 1. Review DoSS records and if the student is currently receiving DoSS

services or if there is an active referral the staffing specialist will notify the appropriate DoSS Supervisor (School Social Work or Psychological Services) and involve the assigned social worker or psychologist in all phases of the expulsion proceedings.

2. Review all DEES and DoSS files (including H/HHB and Speech/Language) for pertinent information, including a review of the IEP.
3. Contact the Educational Component at Youth Hall to determine if the student is known to DHRS and involve DHRS as appropriate--Phone 272-3965.
4. Discuss student with appropriate DEES and DoSS Supervisors.
5. Visit school site and contact: Principal, Dean, Guidance Counselor, Psychologist, Social Worker, Regular Education Teachers, DEES Teachers and/or Speech/Language and Hearing Therapist as needed.
6. Review DEES documents folder and cumulative record at the school site.
7. Conduct a DEES Staffing involving all relevant personnel. The committee, chaired by the Supervisor, DEES Staffing Component, or designee, will review all pertinent data, including the IEP, with the appropriate personnel and parents. Parents/guardians will be invited and a full explanation of all the available procedural safeguards will be provided consistent with 6A-6.331(3). At this time, a recommendation will be made relative to whether or not the act resulting in the request for

expulsion is a manifestation of the student's handicap.

8. The District DEES Disciplinary Hearing will be conducted by the School Board Hearing Master just as Expulsion Hearings are conducted for non-EH/SED students. The Hearing Master will present the recommendation for change of placement as approved by the General Director of DEES to the parent of the student involved.
9. The change of placement will occur upon parental/guardian acceptance and signed consent for placement.
10. Should the change of placement recommendation be refused by the parent or guardian, then the "stay put"²⁹ rule becomes effective. In this situation, the DEES Staffing Committee will review the options available. A court order and/or Due Process Hearing may be pursued by the School Board.
11. The recommendations and results of the District Dees Disciplinary Hearing Committee shall be presented to the School Board for their approval.

The coordinator for suspension/expulsion monitored all students affected from the time they were referred to the time they returned to the system. She was responsible for implementing the process in a timely matter, communicating

²⁹"Stay Put": Florida School Board Rule 6A-6.0331(K) "During the time that an administrative or judicial proceeding regarding a complaint is pending, unless the district and the parent of the student agrees. Otherwise, the student involved in the complaint must remain in the present educational assignment." The U.S. Supreme Court upheld the Stay Put rule in the Honig v. Doe Decision.

the results, monitoring the change in placement, and coordinating the reentry into the system.³⁰

On June of 1986 the State of Florida, including Hillsborough County, became formally bound to these changes as a result of a Consent Decree³¹ and Memorandum Opinion³² resulting from the S-1 v. Turlington case that resolved and settled the claims of the class members affected.

Effect of Honig v. Doe

The Hillsborough County expulsion policy was implemented and maintained as originally developed in 1981 until the *Honig v. Doe* decision.³³ Procedure were subsequently refined and revised to insure compliance specifically for SED and EH students and the *Honig v. Doe* decision. Policy adjustments recommended by the Florida State Board of Education were distributed by another

³⁰This responsibility/monitoring process was verified by the ongoing daily log listing all information on a student from the date of hearing to the date of reentry and the "Expulsion Packet Checklist" used on each individual case.

³¹S-1 v. Turlington, Consent Decree, Case No. 79-8020-CIC-CA, June 30, 1986.

³²S-1 v. Turlington, Memorandum Opinion, Case No. 79-8020-Civ-ATKINS, June 30, 1986.

³³*Honig v. Doe*, 108 S.Ct. 592 (1988).

technical assistance paper.³⁴ Two major conclusions were drawn from the State Departments analysis:

1. The policies and procedures regarding the discipline of handicapped students prescribed in Rule 6a-6.0331(7), FAC, were still required.
2. During proceedings under Section 1415 (e) of the EAHCA, the educational placement (supplementary consultation or related services, resource room, special class, special day school, residential school, special class in a hospital or facility operated by a noneducational agency, or individual instruction in a hospital or home) of a handicapped student may be changed only when:
 - 1) parental consent is obtained: or
 - 2) a Court has authorized the change

A series of meetings were held prior to the dissemination of this technical assistance paper. Several questions raised by administrators during these meetings were researched by the Florida State Board staff with responses published in the paper providing direction to local school districts. Both questions and responses are provided here as both reflect contemporary thought to a major issue:

1. QUESTION: After the decision in Honig v. Doe, can an exceptional student be expelled on the condition that the school district provide at-home services?

RESPONSE: A handicapped student may be expelled only if the misconduct is not a manifestation of the student's handicap. If the student is expelled, the school district must continue to provide special education and related services to the student. This may be accomplished through the homebound service delivery model, as defined in

³⁴Donald S. Van Fleet, Florida Department of Education, Technical assistance paper no. FY 1989-1 distributed to all District Superintendents, Honig v. Doe and the Discipline of Handicapped Students in Florida, 1-4, October 18, 1988.

Rule 6A-6.0311(1)(g), FAC, if such placement is determined appropriate by an IEP committee.

2. QUESTION: If expulsion is recommended for a handicapped student, after a staffing committee's determination that the misconduct was not a manifestation of his handicap, and the next regularly scheduled School Board meeting is over ten school days away, must the child receive special education and related services pending the outcome of the Board decision?

RESPONSE: Yes, In the interim, the student may be suspended for a period not to exceed ten days. Additionally, an IEP meeting could be held and an appropriate alternative placement, providing special education and related services proposed.

3. QUESTION: Does the decision in *Honig v. Doe* have any impact on Florida's caution in avoiding cumulative suspensions of more than ten days during a school year?

RESPONSE: No. Cumulative suspensions of more than ten days during a school year may raise questions regarding the appropriateness of the exceptional student's educational program.

4. QUESTION: If a handicapped student is arrested and placed in a juvenile facility for several days. would these days count as the ten days of suspension referred to by the Supreme Court?

RESPONSE: No. The Court referred to suspension by school authorities for up to ten school days. This does not include days a student is absent from school as a result of an arrest or placement in a delinquent facility.³⁵

Revised Procedures Following Honig v. Doe

These questions and answers were reviewed prior to formulation of the revised policy submitted and approved by the Hillsborough Board of Education:

DISTRICT DEES DISCIPLINARY HEARING PROCEDURES FOR EH/SED STUDENTS

³⁵Ibid., 4-5.

Disciplinary Hearing Process

1. When an EH or SED student commits a serious violation of School Board Policies, suspension and /or consideration for a change of placement may occur. At this time the building principal should notify the Area Director, explaining the offense(s) and circumstances involved.
2. The Area Director will call the Central Staffing Office of the Department of Education for Exceptional Students (DEES) when an EH/SED student is recommended for disciplinary action which could result in a change of placement.
3. The Supervisor of DEES Staffing Component will be responsible for the following procedures in their entirety. This process will be completed prior to the Area Director submitting required documentation to the School Board Attorney and Hearing Officer to substantiate the request for a disciplinary hearing. The Supervisor of DEES Staffing Component or designee will coordinate the gathering of data on the EH/SED student recommended for disciplinary action. The data gathering activities may include:
 - a. Review the student records to determine if the student is currently receiving the services of Student Services and/or ESE personnel or if there is an active referral. In this case, the appropriate Student Services Supervisor and/or Exceptional Student Education Supervisor will be notified and involved in relevant phases of the disciplinary proceedings.
 - b. Contact HRS and other appropriate community agencies. Agency personnel will be involved as needed.
 - c. Contact school site personnel: Principal, Assistant Principal, Guidance Counselor, Psychologist, Social Worker, Regular Education Teacher, and DEES Teachers as needed.
 - d. An Individual Educational Plan (IEP) review meeting will be held at the school site involving all relevant personnel. The committee, chaired by the Supervisor of DEES Staffing Component or designee, will review all pertinent data, including the current IEP. The committee may include the following: appropriate District level Exceptional Student Education and Student Service

personnel, school personnel, parent/guardian, student (when appropriate) and other agency personnel.

- e. At this time, a determination will be made as to whether the act resulting in the request for disciplinary action is a manifestation of the student's handicapping condition.
 - f. An IEP review and development will be completed.
 - g. Based on the student's current needs, as noted on the newly developed IEP, placement options will be considered.
 - h. The committee will make a change of placement recommendation to the General Director of Exceptional Student Education for approval.
- 4. The results of the DEES Staffing Committee meeting will be documented and made available to the Area Director and the Hearing Committee for their review prior to the District DEES Disciplinary Hearing. These results will include the recommendation for the change of placement which has been approved by the General Director of Exceptional Student Education.
 - 5. The District DEES Disciplinary Hearing will be conducted by the School Board Hearing Master just as expulsion hearings are conducted for non-EH/SED students. The Hearing Master will present the recommendation for change of placement as approved by the General Director of DEES to the parent/guardian of the EH/SED student involved.
 - 6. The change of placement will occur upon parental/guardian acceptance and signed consent for placement.
 - 7. Should the change of placement recommendation be refused by the parent/guardian, then the "Stay Put" rule becomes effective. In this situation, the DEES staffing committee will review the options available. A court order and/or Due Process Hearing may be pursued by the School Board.
 - 8. The recommendation and results of the District DEES Disciplinary Hearing Committee shall be presented to the School Board for their approval.

*NOTE:

"Stay Put": Florida School Board Rule A-6.0331(K) "During the time that an administrative or judicial proceeding regarding a complaint is pending, unless the district and the parent of the student agrees otherwise, the student involved in the complaint must remain in the present educational assignment." The U.S. Supreme Court upheld the Stay Put Rule in the Honig v. Doe decision.³⁶

Evolving Issues Yet to be Addressed

Even when the court ordered placement in a private facility, the district continued to be involved in the provision to educate that student. District officials were concerned about the implications of involvement with the consequences for situations where the problem occurs outside of the school setting. Only one student was currently under court ordered placement with the district paying for the educational program.

For students being served in alternative sites, the students were provided with vouchers to use public transportation.

Students tutored as an alternative plan were covered under what is referred to as T-pay. Tutors were paid only for contact hours with the student which included 1 hour planning and maximum 5 hours instruction. This was said to be an incentive for the tutor to see the child. Tutors were sought that had appropriate certification matching the disability of the child.

³⁶Randolph Poindexter and James D. Randall, "Disciplinary Hearing Process," memo submitted to Dr. Walter L. Sickles, Superintendent, School Board of Hillsborough County, July 17, 1989.

Before the *Honig* decision, Hillsborough officials were of a disposition of not wanting to terminate service to expelled handicapped students. Previously, efforts were made to change the placement, use a home-based program that would have a teacher meeting with a student in his/her usual attendance area but at a neutral site such as a public library, special education office, etc.. Time and schedule for such a program was dependent on age with services provided a minimum for the remainder of a semester and maximum up to a year. It was not unusual for students to be forced out, dropped out, or ultimately to quit. Referrals could also be made to alternative education programs and vocational orientation programs but seldom were enough slots available to serve regular and special education students. Community based private programs served primarily drug problems and referrals from the Human Resources Service agency (HRS).

The *Honig* decision came at a time when an increase in numbers of expulsions was dramatic and for more serious infractions. Hillsborough officials felt that their current procedures were not necessarily board policy and thus were prompted to consider revision. At that same time, the Florida legislature put school administrators in a difficult situation by passing new laws impacting disciplinary procedures and liability issues for administrators. Principals, by law, can use corporal punishment. HRS was

successful in getting a law passed that defined "the striking of a child to the point of leaving a bruise" was considered child abuse. A very popular, well respected local administrator got caught up in this dual system which resulted in extensive litigation and greater than usual awareness of the discipline dilemma. Consequently, more options were called for, procedures for monitoring disciplinary actions were developed, and the Special Education administrators were placed under the division of instruction in a reorganization scheme.³⁷ This all occurred at the same time that administrators were notified of the increased emphasis placed on the "stay put" provision as a result of *Honig v. Doe* decision. An extensive plan for inservice and implementation was developed by the four area directors.³⁸ A weekly Wednesday morning staffing procedure was established to handle problematic situations immediately as they occurred. Reasons for expulsion became very objective. Special education was notified regarding the objective definitions of these behaviors which violate school board policy. Judgement for final decision on offensive behavior became a building level decision. Fortunately, expanded alternative education programs became

³⁷Gene Wieczorek, Liz Argott, Jean Stovall and Liz Hetrick, "Planning Document," November 21, 1988.

³⁸Reorganization and staff development memos sent by the Board of Education through the superintendent dated 9-12-88, 11-9-88, and 11-17-88.

available for the mildly handicapped. The Special Education Department provided incentives by adding aides to the alternative education programs and shared the expense of the total program. School board attorneys created a position to avoid--almost at all costs--expulsion attempts for SED, EH, and special education students under sixteen. The average number of special education students taken through the process per year was fifty-five. The general perception of the regular staff, parents, and community was that the special education student gets more attention than most.

Expulsion was only denied for three cases since 1981 and all three of those students were SED or EH. The district has never invoked due process against a parent of a special education student. The district used an extensive mediation process involving an affirmative action third party to serve as the mediator. Expulsion records are annually audited by the State Office of Education. The zero reject policy was presently being questioned since education officials were being viewed as the responsible agency for all students, even those that have committed felonies. Questions as to how education is to respond to problems outside of the system were raised with considerable concern since it was anticipated that special education will ultimately be the receiving and/or responsible department within the system for serving these students. Also, the special education department was currently writing drafts

for rules for services anticipated to be provided for adult handicapped individuals over the age of twenty-one with an expected implementation date of the 90-91 school year. Birth to three services were also anticipated to become mandatory in two years. While these new frontiers offer a challenge to the school district because of the first time effort, the challenge remains to continue to deal with expulsion of handicapped children as a volatile issue yet to be fully resolved by state, federal, or court action.

Summary

The policy and procedures passed in 1985 by U-46 have continued to withstand tests from due process hearings, Illinois State Board of Education evaluations, complaints filed with OCR, and conflict resolution with students and parents. Fewer formal hearings were held each year over the issue of expulsion of handicapped children. In fact, no hearings or complaints have been held or filed since December, 1986. Communications with parents improved dramatically. However, the policy continues to be seen by staff as a polarizing, dual standard system, requiring an extraordinary amount of work.

The tests that it has withstood speaks for the policy's validity. The nature of the dual system characteristic should be addressed relatively soon since the district recently has initiated a formal review of the entire disciplinary procedure of suspension and expulsion.

The number of regular education students affected annually by the system was staggering but not uncommon in our area.³⁹ Hillsborough officials feel a dual system is in place and they don't see resolution in the near future to correct the situation. One administrator was recently killed and one seriously injured in a neighboring school district while implementing disciplinary procedures. Needless to say they are most anxious about changes as they continue to evolve in this area.

Both school districts feel they are moving towards a closer unity in procedures which apply to both regularly and handicapped. Policy evaluation, analysis, and revision are essential to an organization. These two case studies are dramatic illustrations why continued analysis is needed.

³⁹Kane County Educational Service Region: Annual Statistical Summary, August 1, 1989.

CHAPTER V

SUMMARY AND CONCLUSIONS OF CHAPTERS TWO, THREE, AND FOUR

Introduction

The review of historical data in chapters two, three, and four provided assistance and direction from the experience of other local educational agencies application of procedures and development of policies which considered expulsion as a disciplinary strategy or consequence for a student with a handicap. No specific criteria or direction had ever been set within federal statutes and/or regulations to address expulsion of children with handicaps. This chapter's analysis was structured around the research questions defined in this study. The analysis of information available on expulsion of students with handicaps looked at the specific, applicable federal statutes and accompanying rules and regulations, court cases from 1975 to 1989 that dealt with expulsion of handicapped children, the efforts of schools and other agencies in the management of discipline by using expulsion, and the development and application of local education policy and procedures within two large unit districts in Elgin, Illinois and Hillsborough County School District in Tampa, Florida.

Research Question #1:

What was the original intent behind the federal law as it applies to expulsion of handicapped students?

After extensive research it is apparent that expulsion was never specifically treated in the formulation and development of federal law and implementing regulations applicable to handicapped children and youth. Emphasis was put on identification and service to all handicapped children with global priorities of unserved and then underserved established as minimum requirements for federal fund recipients. Little discussion focused on looking behind at the travesties that occurred nor any effort to sanction ways of not serving eligible handicapped children and youth. At the most, mention was made within the comment section accompanying rules and regulations to note ways of providing discipline for acting out children. Additionally, the "stay put" provision written within the due process section served as a reminder that children are to be served, not deprived of education.

The purpose of EAHCA and section 504 is not to immunize handicapped children from normal disciplinary routines, including the extreme of expulsion, but rather to protect them from being discriminated against because of their handicap. Justice Powell's dissenting remarks in *Goss v.*

Lopez¹ characterized an equality standard applicable to all students in relationship to discipline in the school setting:

The State's generalized interest in maintaining an orderly school system is not incompatible with the individual interest of the student. Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This understanding is no less important than learning to read and write. One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life. In an age when the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools. When an immature student merits censure for his conduct, he is rendered a disservice if appropriate sanctions are not applied or if procedures for their application are so formalized as to invite a challenge to the teacher's authority²--an invitation which rebellious or even merely spirited teenagers are likely to accept.

The lesson of discipline is not merely a matter of the student's self-interest in the shaping of his own character and personality; it provides an early understanding of the relevance to the social compact of respect for the rights of others. The classroom is the laboratory in which this lesson of life is best learned.³

Research Question #2

What is the federal law applicable to expulsion of handicapped students?

Four federal statutes--Section 1983, Section 504, the Education of All Handicapped Children's Act (EAHCA), and the

¹419 U.S. 565(1975).

²J. Dobson, Dare to Discipline (1970).

³Goss, 592-93.

Handicapped Childrens Protection Act(HCPA)-- have been applied in the area of special education rather consistently between 1975 and 1989.

Section 1983⁴

This provision was enacted in 1871 and was first applied by the Supreme Court to state employees in 1961⁵ and then again to local governments in 1978.⁶ Under section 1983, acceptance and use of federal dollars was not a criteria for application. It applied to actions taken under color of the law usually involving deprivation of rights. Exhaustion of administrative remedies(none included under the act) was not necessary. Awards included compensatory relief and attorney's fees. Two tests surfaced under this section: (1)the conduct complained of must be committed by a person acting under color of law; and (2)the conduct must deprive the plaintiff of rights secured by the Constitution or laws of the United States.⁷ The profile of

⁴42 U.S.C. § 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any a citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

⁵Monroe v. Pape, 365 U.S. 167(1961).

⁶Monell v. New York City Dept of Social Services, 436 U.S 658(1978).

⁷J.Briscoe v. LaHue, 460 U.S. 325, 329030(1983).

a basic case brought under this section would find the plaintiff attempting to demonstrate that a governing body or authorized decision maker took formal or informal action to adopt and implement as general rule or to reach a decision in a particular case which has deprived the plaintiff of protected rights. Enforcement under this section can occur only in federal courts. Of the fourteen cases reviewed, only four sought relief under section 1983.

Section 504⁸

Within the scope of this study, section 504 has been applied for the protection of handicapped children against denials of or exclusion from educational opportunities, for the prohibition of unequal treatment of handicapped children, and the protection of handicapped children where the EAHCA is unavailable or inapplicable. Section 504 has an institutional focus applying only to agencies receiving federal funds. Receipt of federal funds carries with it the mandate to comply with anti-discrimination requirements within the act throughout the system and/or program. School districts receiving federal funds are required to provide all handicapped children with access to all programs in the form of an appropriate education and allow for participation

⁸Rehabilitation Act of 1973, 29 U.S.C. § 504. No otherwise qualified handicapped individual in the United States, as defined in section 706 (60 of this title) shall, solely by reason of his handicap, be excluded from his participation in, be denied the benefits of, or be subjected to the discrimination under any program receiving Federal financial assistance.

on an equal basis in all activities for which the child is qualified. Administrative enforcement of section 504 is provided by the federal Office of Civil Rights. The statute provides for access to the courts especially where problems appear to go beyond an individual child's program. Remedies in the form of compensatory relief are uncommon. While rules and regulations(very similar to those adopted for EAHCA but adopted considerably later) now exist under this section, compliance with rules and regulations under EAHCA are sufficient to establish compliance. Of the twelve cases reviewed, eight sought relief under section 504.

Education of All Handicapped Children Act(EAHCA)⁹

⁹PL 94-142, 89 Stat. 773 (1975), 20 U.S.C § 1400 et seq. The Act requires at a minimum the following procedural safeguards to handicapped students and their parents: 20 U.S.C § 1415(a):

(A) An opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

(B) Procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward to the state, including the assignment of an individual(who shall not be an employee of the state educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian.

(C) Written prior notice to the parents or guardian of the child whenever such agency or unit:

- (1) proposes to initiate or change, or
- (2) refuses to initiate or change, the identification, evaluation, or

(continued...)

The EAHCA was enacted in 1975 as the first comprehensive federal legislation with an attached funding mechanism to ensure that all handicapped children receive a free appropriate education. In exchange for assurances at the state and local level that all handicapped children will be served as defined in the accompanying regulations, federal dollars flow to states who in turn flow through dollars to local schools. Congress intended with the passage of EAHCA "...to encourage and assist the provision of free appropriate public education. It was passed in light of most handicapped at the time totally excluded or sitting idly in regular classes."¹⁰ The focus under EAHCA is remedial and specifically child centered. The act contains specific procedural requirements and guidance in most areas needed to achieve compliance. The act clearly spells out administrative remedies through a detailed due process system for dispute resolution followed by eventual

⁹(...continued)

educational placement of the child
or the provision of a free
appropriate public education to the
child;

(D) Procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and
(E) An opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

¹⁰House of Representatives Report 94-332, (1975), 2.

recourse to the courts. Of the fourteen cases reviewed, all fourteen sought relief under EAHCA.

Handicapped Childrens Protection Act(HCPA)¹¹

The combination of section 1983, section 504, and EAHCA created a comprehensive network to assist parents and advocates in obtaining equal opportunity for handicapped children and youth. Monetary compensation and attorney's fees were initially not provided for under EAHCA so combining all avenues was common practice. In 1984, the Supreme Court attempted to establish a neutralizing position to end this pursuit for compensation by making EAHCA the ruling authority in disputes over denial of free appropriate education. This ruling came in *Smith v. Robinson*¹² and virtually eliminated parents from receiving an award of attorney's fees. A typical reference to the Supreme Court's decision in *Smith v. Robinson* is given in the *Doe v. Maher*¹³ decision:

There is no doubt that the remedies, rights, and procedures Congress set out in the EHA are the ones intended to apply to a handicapped child's claim to a free appropriate public education. We are satisfied that Congress did not intend a handicapped child to be able to circumvent the requirements or supplement the remedies of the EHA by resorting to the general anti-discrimination provision of 504.¹⁴

¹¹PL 99-372.

¹²468 U.S. 992(1984).

¹³793 F.2d 1470 (9th Cir. 1986).

¹⁴468 U.S. 992(1984).

This action prompted introduction in late 1984 of the Handicapped Children's Protection Act(HCPA)¹⁵. It was ultimately signed into law by President Reagan on August 11, 1986. HCPA delineated three important activities needed as part of a solid foundation for the provision of education to handicapped children and youth. The act: (1) authorized awards of attorneys' fees for parents if their position was upheld; (2)ensured that administrative remedies were exhausted before a judicial proceeding could commence in many special education cases; and (3)reaffirmed the availability of federal statutes other than EAHCA as vehicles for providing rights and remedies to handicapped children.

While this statute was not applied in any of the twelve cases reviewed, its impact in the future is very clear. It provides an equalizing fairness to parents in the arena of conflict resolution.

Federal Rules and Regulations

As a condition for receipt of federal dollars to assist with carrying out the federal mandate to provide all handicapped children a free and appropriate education, states are required to provide assurances and plans to ensure that all procedural safeguards and regulations covered by the EAHCA are being implemented. Presently, all

¹⁵Public Law 99-372, Act of Aug. 5, 1986, 100 Stat.796.

states receive federal financial assistance under EAHCA.¹⁶

The EAHCA covers handicapped children defined in the act as:

mentally retarded, hard of hearing, deaf, orthopedically impaired, other health impaired, speech impaired, visually handicapped, seriously emotionally disturbed, or children with specific learning disabilities who, by reasons thereof, require special education and related services.¹⁷

While no specific section of the act or rules directly addresses expulsion as a disciplinary procedure, the following play an integral role in interpretation of the act as it has been applied to expulsion actions taken by school boards of education:

- Right to a free appropriate public education
- Procedural safeguards (see footnote 3)
- Educational services are provided in the least restrictive environment(LRE)¹⁸

All twelve cases reviewed, both district case studies, and all related literature referenced these specific rules. While there have been differences as to how section 504 and EAHCA have been implemented relative to these rules,¹⁹ the

¹⁶L. Bartlett, "The Role of Cost in Educational Decision Making Involving the Handicapped Child," Law & Contemporary Problems, v48, (Spring 1985): 8.

¹⁷20 U.S.C. § 1401(4)(a)(1).

¹⁸34 C.F.R. 300.121, 300.110-.151 (1986).

¹⁹"Final Report to the Secretary of the Task Force on Equal Educational Opportunity for Handicapped Children(October 15, 1980), Education Of the Handicapped L.
(continued...)

rights under EAHCA are the same rights guaranteed under 504 and therefore EAHCA rules are used for compliance purposes for both acts.

Research Questions #3 and #4

- #3 *What patterns, if any, have developed from application of federal law regarding expulsion of handicapped students?*
- #4 *How have federal court cases interpreted federal law and the policies that have been developed to implement that law?*

Research questions #3 and #4 are addressed together in this final section of analysis due to the interwoven quality of the results of the research. Since not directly addressed in the legislation and rules and regulations identified as governing factors in the delivery of special education programs and services and ultimately the framework for considering disciplinary action of expulsion of the handicapped, several key considerations and questions surfaced from the research of legal and historical data. Those significant within the context of this study on expulsion of the handicapped included:

- Treatment of expulsion as if it were a change in placement

¹⁹(...continued)

Rep., 1989-81 (CRR) AC-67, AC-68; Oversight Hearing on Monitoring Activities of the Office of Special Education and Rehabilitation Services Before the Select Education of the House Committee on Education and Labor, 98th Cong., 2d Sess. 9-35 (1984) (testimony by Frederick Weintraub, Council for Exceptional Children, discussing coordination and enforcement).

- Consideration of inappropriate behavior in relationship to the handicapping condition
- Determination of relatedness made by a qualified team of professionals familiar with the student and the handicapping condition
- Determination that the child was a danger to himself or others
- Administrative remedies were used
- Student being dismissed without notice when initially suspended
- Indefinite suspension was used
- Stay-put rule was used during administrative hearings or judicial proceedings
- Interim placement was used during the time period of administrative remedy or judicial action
- Alternate placements were offered during administrative hearings or judicial proceedings
- Placement was appropriate at the time of the inappropriate behavior appropriate
- Inappropriate placement caused the inappropriate behavior
- Injunction was sought by the parent(P), school(S), or court(C)
- Expulsion was permitted when determination was made that the behavior was not related to the handicap
- Expulsion was prohibited when determination was made that the behavior was not related to the handicap
- Decision was made to expel before complaint was addressed through due process

- Procedural errors by district caused or were related to problem

These areas were analyzed individually based on data collected in chapters two through four. The chart on the page 204 summarizes the application of each of these areas in the existing federal cases. The following citations are provided in lieu of footnotes to supplement the chart on page 204:

- Stuart v. Nappi, 443 F.Supp. 1235
- Howard S. v. Friendswood ISD, 454 F.Supp. 634
- Sherry v. New York State Ed. Dept, 479 F.Supp. 1328
- Doe v. Koger, 480 F.Supp. 225
- S-1 v. Turlington, 635 F.2d 342
- Kaelin v. Grubbs, 682 F.2d 595
- Adams Central SD #090 v. Deist, 334 N.W. 2d 775
- Victoria L. v. School Bd. of Lee County, 741 F.2d 369
- Jackson v. Franklin County School Board, 765 F.2d 535
- School Board of Prince William v. Malone, 762 F.2d 1210
- Doe v. Rockingham County School Board, 658 F.Supp. 403
- Honig v. Doe, 108 S.Ct. 592

Treating Expulsion as Change in Placement

Almost without question, when expulsion was used or threatened to be used, a point of reference for compliance with EAHCA or allegation of denial of rights centered around an alleged change of placement taking place. When a change in placement occurred, the current placement should have remained in effect until any dispute over that change was resolved.²⁰ Regardless of the actual or proposed action taken by either party, all of the twelve cases analyzed failed to use this premise.

²⁰20 U.S.C. § 1415(e)(3).

CHART A

Significant Issues Identified
in Federal Court Cases
Related to Expulsion of
Handicapped Students

N=NO

Y=YES

N/A=Not Applicable

- Stuart v. Nappi, 443 F.Supp. 1235
- Howard S. v. Friendswood ISD, 454 F.Supp. 634
- Sherry v. N.Y. State Ed. Dept, 479 F.Supp. 1328
- Doe v. Koger, 480 F.Supp. 225
- S-1 v. Turlington, 635 F.2d 342
- Kaelin v. Grubbs, 682 F.2d 595
- Adams Central SD #090 v. Deist, 334 N.W. 2d 775
- Victoria L. v. Bd. of Ed. Lee County, 741 F.2d 369
- Jackson v. Franklin County S.B., 765 F.2d 535
- S.B. of Prince William v. Malone, 762 F.2d 1210
- Doe v. Rockingham County S.B., 658 F.Supp. 403
- Honig v. Doe, 108 S.Ct. 592

Treated expulsion as change in placement	N	N	N	N	N	N	N	N	N	N	N	N
Determined inappropriate behavior was related to handicapping condition	N	N	N	N	Y	N	N	Y	Y	Y	N	Y
Decision of relatedness made by qualified team familiar with student and handicap	N	N	N	N	N	N	N	Y	Y	Y	N	Y
Determination made that child is danger to self or others	N	N	Y	N	N	N	N	Y	Y	Y	N	Y
Administrative remedies used	N	N	N	Y	N	N	Y	Y	Y	Y	N	Y
Student dismissed without notice when suspended	N	Y	N	N	N	N	N	N	N	N	N	N
Indefinite suspension used	N	Y	Y	Y	N	N	Y	N	N	N	Y	Y
Stay-put rule used during due process and/or litigation	N	N	N	N	N	N	N	N	N	N	N	Y
Interim placement used during due process and/or litigation	N	N	Y	Y	N	N	Y	N	Y	Y	Y	Y
Alternate placements offered during due process and/or litigation	N	N	N	N	N	N	N	Y	Y	N	Y	Y
Placement was appropriate at the time of the incident	N	N	Y	Y	N	Y	N	N	Y	Y	N	Y
Inappropriate placement caused inappropriate behavior	Y	Y	Y	N	N	N	Y	N	N	N	Y	Y
Injunction by parent(P), school(S), or court(C). N/A= not applicable	P	P	P	N/A	C	C	N/A	P	P	N/A	P	P
Expulsion used after determination that behavior was not related to handicap	Y	Y	N	N	Y	Y	N	N	N	Y	N	N
Expulsion prohibited after determination that behavior was not related to handicap	N/A	N/A	N	N	N	N/A	N	N	N	N	N	N
Decision to expel before complaint resolved through due process	Y	Y	Y	Y	Y	Y	Y	N	N	N	N	Y
Procedural errors by district caused/related to problem	Y	Y	Y	Y	Y	Y	Y	N	Y	N	N	Y

The federal Office for Civil Rights(OCR) and federal Office of Special Education Programs(OSEP) both consider suspension beyond ten days as a change in placement. As a regular disciplinary tool, exclusion from school for up to ten days offers a consequence that is accepted in different ways. For some students suspension is very effective while for others it is exactly what they wanted--to get away from school. Grades may or may not be effected. Expulsion, on the other hand, really doesn't change the placement. In reality, expulsion just delays returning to the previous placement. As a result, all credit is lost for that period which usually amounts to a semester or year of credit. It affects different students in different ways. Some profit by the experience and becomes a confirmation to others that school was of little value.

The significance for those students eligible for special education is substantial. The placement at the time of the expulsion should be appropriate, which means that the work is well suited to the well defined needs established by extensive testing and completion of a full case study. The placement should also be such that those special services provided are delivered to the greatest extent possible in an environment with non-handicapped children. Consequently, there are an extreme number of variables which are presumed and may need to be considered further. Because of the interruption, the interpretation has received standing that

the placement is changed. This, therefore, will require reevaluation, convening of an MDSC, determining eligibility, writing an IEP, and determining an appropriate placement in the least restrictive environment. Any disagreement with the final recommendation can be resolved by exercising the impartial due process conflict resolution system established under EAHCA. If an attorney is secured by the parents and the parents position is upheld by the hearing officer, attorney's fees may possibly be awarded at this level or following judicial proceedings.

For regular and special education students, a formal hearing before the board of education is usually available with provision for bringing an attorney, cross examining witnesses, and providing testimony. When expelled, the regular student's placement is not changed--it is delayed. The student loses credit for the semester and/or time expelled but is then able to return to the same placement. This is a severe consequence and must be judged accordingly to the severity of the misbehavior. Typically, the type of behavior for which such severe discipline is required is totally disruptive to school and its operation and/or harm to others threatening school safety for the student and others.

In *Cronin v. Board of Education*²¹ the court ruled that graduation was a change in placement and removal by

²¹689 F.Supp.197(1988).

graduation during the pendency of due process is a violation of the stay put rule. Graduation was considered similar to expulsion in that "it results in total exclusion of a child from his/her educational placement." The case involved a twenty year old emotionally disturbed student attending a vocational school. The school sent notice that he was to return next year and the school committee that determines placement determined that he should graduate. Parents filed for due process and an injunction to block the graduation. The student could have attended the school after graduation under the auspices of a rehabilitation agency but parents refused. In this case the court used a semblance of criteria as to what constituted a change in placement by focusing on the importance of the particular modifications involved in the students educational program and the harm to the defendants. This resulted in the additional education available to a student with a handicap being weighted against the cost of one additional student plus transportation costs. The parents were upheld.²²

Applied to disciplinary matters, this test has some value. It could consider the severity of the handicap, the time remaining in the student's program, and the end benefit by experiencing consequences. This added context for consideration of a handicap has extended implications for our penal system if ultimately formulated as a standard.

²²Ibid., 203,199,204.

Determined Inappropriate Behavior was Related to
Handicapping Condition

This is the one prerequisite to disciplinary action that differs between regular and special education. It's a natural, logically placed activity in the normal sequence. All data suggests a comparative analysis of the behavior that's unacceptable. School board and administration's responsibility for maintaining a safe environment in schools has been shown to go back as far as 110 years ago and is reinforced in ten of the twelve court cases analyzed. Goss established the rules for suspension and set the expectation for degree of hearing and due process to match the severity of the action being taken--the greater the penalty, the more comprehensive the process to insure that all rights are respected.

Special education supplements what's being done in regular education because of special needs of the students. All children and youth can learn and have the right to have the opportunity to learn. The differences in children have been legitimatized by our society. The process to determine, accurately define, and provide for those differences is comprehensive. Once defined and provided for, equal access to education is achieved theoretically. There is universal acceptance that any denial of this opportunity **because** of the handicapping condition is discriminatory and cannot be permitted by law. This then, is the turning point at which all consideration focuses when

expulsion is considered. A study of the behavior is absolutely necessary in relationship to both existing school rules, the plan developed and currently being implemented for the student, and finally and most importantly, in relationship to the individual's handicap. This requirement once again equalizes all students to continue to be eligible to access the same right.

Decision of Relatedness Made by Qualified Team Familiar with Student and Handicapping Condition

This seemingly mandatory, logical step in the process has typically not been followed. Up to 1984, this was not done in the major court cases reviewed. Eight of the twelve cases that involved eligible handicapped students overlooked this step. No single individual can make the decision for eligibility and placement under the law. No single individual should be entitled to make the decision to discipline to the extreme of removing a student from access to education. It is the opinion of the author that this applies to all students based on the accepted premise that equal access exists to education for all. Therefore, the decision to determine if the misconduct (inappropriate behavior) was a result of or caused by the student's handicapping condition must be made by the same group who considered the student's behavior and learning style and determined eligibility. This at a minimum should be the child's special education teacher, school administrator responsible for providing special programs and services,

school psychologist, social worker, learning disability teacher(or that staff member responsible for completing educational assessments), regular school administrator, and, on as an needed basis the speech therapist and school nurse(only if medication or medical condition is involved). Parent involvement is seen as an option when considering relatedness. Parents must be involved when a change is considered in the student's program or services. After the decision on relatedness has taken place it is well advised to get parents involved for determining the decision to expel. The severity of the problem at this stage will generally find the parent very involved and eager to assist in any way possible. It is this same type of acknowledgement and understanding of consequences that needs to taught to all students. Just as important is the knowledge and understanding to constructively approach a corrective path to avoid a repetition of the problem.

Determination Made that Student Was Danger to Self or Others

One situation existed that all were in agreement with regarding immediate removal of a student from the school environment. Such a situation found the student perceived as a danger to him/herself or others. The vested responsibility of school officials is well established to permit this discretionary, immediate judgment. Therefore, prompt follow-up by a team meeting to consider the behavior as described above and the situation of endangering self and

others may permit the student to be suspended up to the maximum of ten school days even if it is determines that a relationship existed between behavior and the handicap. If that relationship did exist, the team with the parent can deliberate to modify or change the program. Should it be determined that the student not, under any circumstances, return to school, accord must be reached with the parents for providing education through an interim program until a more restrictive program can be provided or until the program can be worked out to the agreement of both parties. Should no agreement be reached between school and parents in this instance, the school may go to court. The court requires the school officials to adequately demonstrate that if the child were to remain in the current program continued danger would exist to self or others or both. Of the twelve court cases reviewed, five students were determined to be a danger to themselves or others. Only four of those five had decisions made by teams. Behaviors included self abuse, pushing and hitting a teacher, disruptive behavior in school, threatening to kill another student, sexual misconduct, stealing, and extortion.

Administrative Remedies Used

EAHCA has built in administrative remedies in the form of impartial due process hearings to resolve disagreements between parents and schools. Utilization of administrative remedies is required generally before resorting to judicial

proceedings. The exceptions relate to a determination that exhausting administrative remedies first would be pointless and a disregard for time. Those exceptions go beyond the scope of this study. Due process hearings are usually lengthy and adversarial in nature. Parents and schools can request a hearing at any time over any issue. Of the twelve cases reviewed only four used administrative remedies to attempt to resolve the dispute created by expulsion before bringing the matter to court. This was one area many school districts and special education administrators were hoping would be addressed in *Honig v. Doe*. Unfortunately, the issue was not addressed and the question persists as a debateable issue among school district representatives, parents, and advocates.

The impartial due process hearing is an added hurdle beyond that required by regular education students. However, as written in *Goss*, the degree of the process increases with the severity of the nature of the disciplinary action. Nothing short of removing opportunity forever is more serious than to void a portion of eligible time²³ that a handicapped child has available for obtaining an education. All unresolved conflicts can be taken to due process. Substantial evidence is available, however, which

²³Handicapped children may remain in a school program under successful completion, graduation, or age 21. If the child turns twenty one in the last year of attendance, the child is allowed to finish that school year.

indicated that a child cannot be expelled for behavior which was related to his/her handicap.

Student Dismissed Without Notice When Suspended

Prior to expulsion, a student may be removed from school for up to ten days under well established provisions for suspension. When suspension occurs, notice should be given orally and followed up in writing. Three of the twelve cases reviewed revealed that the students were dismissed without formal notice. In all three cases, the behavior was extreme enough or the involvement of the handicap was so severe that one can only speculate that unwritten, non-verbal communication took place or was presumed to have occurred. Typically, special education students, school, and parents have a better than average communication system established. Meeting all requirements of the act requires notices be sent home for all meetings, evaluations, reevaluations, IEP conferences and annual reviews, as well as IEP progress and follow up activities often built into the IEP. While this may be a fairly customary, routine procedure, formal contact with parents initiated from suspensions and particularly those as preliminary to expulsion should be in writing following a phone call.

Indefinite Suspension Used

When a suspension occurs prior to expulsion, ten days maximum is the parameter established to complete all

required activities. This includes convening the professional team to consider the handicap in relationship to the handicapping condition, convening a multi-disciplinary staffing, IEP conference, notice to parents, obtaining release for sending information to other prospective placements if needed, obtaining parent permission for additional testing that may have to be completed, or for seeking an injunction to keep the student for reentering school since he may be a danger to him/herself or others. Four of the twelve cases reviewed revealed situations where suspensions were considered indefinite. A variety of situations can result which may make suspension occur for an indefinite time period. The student may be sent home and told to have parents call and attend a meeting before the student would be allowed to return to school or to process the case further. Another example would be that no monitoring of suspensions resulting in repeated suspension being given out consecutively or through out the year exceeding the 10 day standard. A third example may find circumstances where school and parents cannot agree on a meeting time because of involvement of third parties. Parents may unknowingly exceed the 10 day maximum by taking a position that they don't and won't have their child return to such a school until something happens conditionally or ever. Schools may make inappropriate demands on parents for getting tests completed or

extinguishing behavior. Schools may also claim to the parent that they are just unable to serve the child because of lack of service or lack of quantity of service.

All these situations are similar to those experiences and behaviors of the past that stood between school and handicapped children receiving an appropriate education. This is the major reason why EAHCA was passed. None of these circumstances should exist. Absolutely no reason justifies exceeding a 10 day time period during which time school, parents, and other authorities can meet to resolve issues standing in the way of the child continuing his education in the current placement, in an alternate placement, or obtaining a court order to exclude from school until a more appropriate placement and/or the dispute should be settled. The burden for seeing that this test occurs is on the schools and not the parents or students.

Stay Put Rule Used During Due Process Hearings and/or Litigations

Perhaps the most important of the procedural safeguards available to parents and students under EAHCA, the "stay put"²⁴ rule allows the handicapped student to remain in the

²⁴20 U.S.C. § 1415(e)(3) provides ...during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the current educational placement of such child, or, if applying for initial admission to a public school shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

current placement until all proceedings authorized under EAHCA are completed. Since due process hearings and judicial proceedings are often lengthy, this section is crucial to seeing that the child remains in an educational setting. One of the twelve cases, and only because of a court initiated injunction, maintained the students in the previous placement. That one case was *Honig v. Doe*. The stay put rule was a major issue in the *Honig* case. The court issued an injunction on its own to force the student back into his previous setting. The *Honig* ruling interpreted the stay put rule as a very clear, direct statement by Congress that public schools do not have the unilateral authority to remove handicapped children, particularly emotionally disturbed, from school for disciplinary reasons. The stay put rule reinforced the availability of emergency suspension but clearly empowered the court as the only source for granting relief.

Interim Placement Used During Due Process and/or Litigation

An interim placement, as a temporary change from the placement which existed at the time of the incident, must be agreed upon between parents and school in order to be used during the administrative remedy and/or judicial proceedings. This is the window in the stay put rule that provides the school relief and the student an opportunity to avoid returning to that environment which was the scene of inappropriate behavior. While only one case used the stay

put rule, five were able to resort to interim placements. All five were situations involving disruptive behavior in the school setting. This option was most critical to continuing a working relationship with parents while keeping or maintaining their child in a program that had been given consideration in its formulation based on the student's current needs.

Alternate Placements Offered During Due Process and/or Litigation

More so when judicial proceedings are taking place than with due process hearings, an alternate placement was offered, formulated, and/or accepted by school and parent. The length of time during the course of a judicial proceeding exceeded a year. The usual and customary required activities associated with reviewing placements occurred annually. Also, obvious change in behavior, discovery of middle ground, or development of alternatives during the course of judicial proceedings was common. Similarly, in the due process hearing procedure, working with an outside neutral party generated positive change. Four cases used alternative placement at some time during the expulsion process. Expulsion generally affects the remainder of the school year and usually never more than a year. Florida permits a maximum of two years but never more than the remainder of the year in which the expulsion occurred and the following year. With the prospect of returning to school eminent after an expulsion, the normal

process of determining appropriate placement required consideration of current information with behavior given additional emphasis anyway. Therefore, the question can be asked, "Why not just proceed immediately rather than wait for the expulsion period or judicial proceeding to end?"

Placement was Appropriate at the Time of the Incident

Appropriateness of the placement was crucial to understanding and determining the relationship between the behavior and the handicapping condition. There was little disagreement that if a placement was inappropriate that the unacceptable behavior or misconduct was likely to be a resulting factor. To penalize a child for this type of oversight was totally unacceptable. Many different situations existed in six of the twelve cases where placements were determined to be inappropriate.

An inappropriate placement can result from many different factors including lack of or insufficient quantity of related services, unrealistic goals and objectives, reliance on the mainstream for too much of the academic load and visa versa, not sufficiently challenged by the curriculum or program, too little or too much demand by the special class or teacher, personality conflict, inappropriate diagnosis, inability to handle non-structured situations in a public school program, inability to handle the stress and demands placed on the child outside of school, and unmet needs in the present school program.

Inappropriate Placement Caused Inappropriate Behavior

In six of the twelve cases reviewed where the placement was inappropriate, only one was considered realistically (writer's opinion based on the case study and factual information) to not have been the cause of inappropriate behavior. That case involved an LD student who acted as a go between for selling drugs for regular students. In all other cases there was a direct link between the inappropriate placement and the inappropriate behavior. This responsibility falls on the professional team for decision making. It's often good to eliminate the administrator or staff person, if that individual is involved directly in the incident, to get as non-biased view as possible. For these same reasons, parents should be left out of this step as well.

Injunction by Parent, School, or Ordered by the Court

Of the twelve cases reviewed only three did not involve an injunction to return the student to school. Seven requests were filed by a parent and two by the court. The court order in the *S-1 v. Turlington* case was significant in that it affected the whole state and the handicapped as a class. The *Honig* case was crucial as it reaffirmed that schools were stripped of their unilateral empowerment to remove handicapped children from school, especially

emotionally disturbed students. Only the court can provide appropriate relief.²⁵

Expulsion Used After Determination That Behavior Was Not Related to Handicap

Five of the twelve cases reviewed agreed that expulsion was an appropriate disciplinary method for a child with a handicap as used in a similar fashion with regular students. In all five cases, however, the stipulation was made that consideration had to be first given to determination of whether or not the behavior was caused by the handicapping condition. Also, such decision could only be made by a qualified team of professionals. Further stipulation was added to two decisions which did not permit the total dropping of educational services despite approval for expulsion. One permitted expulsion with the exception of emotionally disturbed students. Only one case outright refused to allow expulsion of a handicapped child under any circumstances.

Compensation Awarded When the Court Found That Rights were Violated(not included on chart)

This study ends at the threshold of an era where compensation for attorney's fees is just beginning. The passing of the HCPA established the parameters for such action to occur putting the parents into a equal position for resolution of conflict. Of all the cases reviewed only two involved awards of compensation of time or dollars. In

²⁵20 U.S.C. § 1415(e)(2).

Turlington, attorneys fees were provided in the settlement of the dispute for all nine families. In *Malone* sixteen months of additional schooling was provided beyond that permitted by law. Awarding of attorney's fee's and other compensation is not automatic. The position of the parents must be upheld to support such a request.

Decision to Expel Before Complaint Resolved Through Due Process

Eight out of the twelve cases reviewed made decisions to expel or exclude and proceeded to do so before an opportunity was provided to the parent to attempt to resolve through due process. While the writer does not agree that change of placement occurs with all expulsion, it is well established from the cases reviewed that such a position is almost unanimous with all courts. Should a position be taken that expulsion could be used as a disciplinary consequence, due process would automatically apply.

Procedural Errors by District Caused/Related to Problem

In all but three cases of the twelve reviewed, the school district committed procedural errors which either caused or had a significant relationship to the problem exhibited by the student. Based on the facts established in the eight cases deciding on expulsion, all had committed procedural violations significant enough to speculate the parents would have been upheld in all cases. If nothing else, a lesson from this conclusion can be time saving and beneficial to children and parents.

Conclusions

Research Question #1:

What was the original intent behind the federal law as it applies to expulsion of handicapped students?

Expulsion of handicapped students is not directly addressed in any federal legislation, nor was it considered in the formulation and development of EAHCA. The intent of the Education for All Handicapped Children Act and Section 504 (identified as the major federal statutes applicable to expulsion of students with handicaps) was to treat the handicapped as equals with the non-handicapped. EAHCA and Section 504 and their implementing regulations were designed to be used as maps to guide schools on their course to serve handicapped children. Their goal was to accurately address who, how, and when handicapped children have to be served. The goal of EAHCA is not to impart greater rights to the handicapped but to treat the handicapped as equals with the non-handicapped.²⁶

Research Question #2

What is the federal law applicable to expulsion of handicapped students?

P.L. 9-142, the Education of All Handicapped Children Act, and its implementing regulations were identified as the major federal law applicable to circumstances where

²⁶102 S.Ct.3034(1982) at 3043. The U.S. Supreme Court in Rowley stated: "...the intent of the act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."

expulsion was used or considered for use with students who had handicaps. The EAHCA has a remedial, individual child base which leans towards greater provision and consideration for individual needs.

Research Question #3

What patterns, if any, have developed from application of federal law regarding expulsion of handicapped students?

A handicapped child cannot be expelled after it is substantiated that the misconduct is related to his/her handicapping condition. If there is no relationship to the handicapping condition and the misconduct the student with a handicap may be expelled similar to any other student. With the exception of the fifth circuit, all services may be temporarily halted during the expulsion period.

Research Question #4

How have federal court cases interpreted federal law and the policies that have been developed to implement that law?

Expulsion of a handicapped child, after it has been determined that a relationship between the behavior and the handicapping condition does not exist, is not a change of placement but merely a delay and/or a consequence, of the implementation of an appropriate program. That program needs to be reviewed with the parents in an MDSC and IEP meeting, reaffirmed, and permitted to be challenged by an impartial due process hearing.

The determination of the relationship between the handicapping condition and the inappropriate behavior can

only be made by a team of professionals familiar with the student, the student's program, and handicapping conditions.

The decision for expulsion should include the parent and culminate only after a thorough review of the existing placement. Consideration at that time should also be given to determining if the child is a danger to himself or others for appropriate implementation of the stay put rule.

Interim and/or alternative programs should be immediately available to students who are determined by a professional team to be a danger to self or others and are being considered for expulsion which requires deliberation and conflict resolution activities beyond a ten school day period from the date of the initial suspension.

Where no agreement can be reached between parent and school district for an alternative program, the school must proceed to court for an injunction. The burden is on the school to demonstrate to the court that the child will continue go be a danger to him/herself and others if allowed to continue in the present placement.

Chapter VI will use these conclusions to provide suggested recommendations and criteria for developing effective local school district policy.

Chapter VI
POLICY RECOMMENDATIONS
Introduction

One of the most difficult jobs for school administration and boards of education today is developing policy for unclear, often misleading statutory language particularly as it often relates to mandates and areas where schools have but little choice to comply. Such has been the case with expulsion of handicap children. The vested responsibilities of school boards to maintain a safe environment for all schools to allow all children to learn is well established. The availability of school opportunities is stronger than ever particularly since the passage of PL 94-142. Control of the school environment has been tested and balanced as a result of the Goss v. Lopez decision. Policy has evolved through consistent application and interpretation of common law. The judicial branch, through its investigatory capabilities, makes historical inquiries into what legislators and framers intended to say in developing statutes. These types of deliberation are worthwhile to clarify ambiguous mandates. Expulsion of handicap children under the mandate continues to demand this deliberation and attention. As Giandomenico Majone so

accurately stated, "Public learning is important--the public has to decide and understand for itself what value to place on certain issues."¹

Philosophy Behind Expulsion Policy Development

The policy developed and utilized by any school district for disciplinary action involving expulsion should be equally applicable to all students with the sole exception being that formal deliberation occurs focusing on the handicapped student's handicapping characteristics relative to the misconduct prior to determining that the student should be expelled. If the behavior is related to the handicap, then the child's placement should be reconsidered and consequences defined by the IEP committee. This deliberation on relatedness is the principal difference between what is often perceived as two systems of discipline.

Consideration of Historical Trends in Policy Development

The historical background of the use of expulsion with handicapped students since 1975, formulated from an extensive review of the literature, applicable federal court cases and study of two major school systems, is applied in this chapter to suggested recommendations and criteria for school district policy development related to expulsion as a

¹Giandomenico Majone "Policy Analysis and Public Deliberation," in The Power of Public Ideas, ed. Robert Reich (Massachusetts: Ballinger Publishing Co., 1988) 145.

disciplinary procedures that can legally, consistently, and fairly applied to children with handicaps.

Philosophy Statement

A global philosophy statement should incorporate expulsion as an extreme disciplinary action applicable to all students. As a result of consideration of the handicapping condition related to the misconduct, the policy should be individually applied equally and without prejudice.

Suspension

Suspension is used in the majority of the disciplinary consequences applied in most current policies. While this study did not focus on suspension, the two are close to inseparable because expulsion is initiated by an initial suspension. A handicapped student may be removed temporarily, up to ten days, regardless of the presence of a handicap or not. This includes an emotionally disturbed child or more globally, any child disrupting school or proving to be a danger to self or others. All current policies and procedures need to be examined carefully for their fairness in application to regular and special education students. It is highly recommended that a team of professionals assess the relationship of the handicap to the misconduct in suspension situations as well as potential expulsion cases. Any individual suspension or accumulation of suspensions reaching ten school days should automatically

trigger a multi-disciplinary staff conference to consider the misconduct that has occurred and the appropriateness of the placement.

Prior Notice

Awareness of the disciplinary policies and procedures should be initiated each time students at any age enter the system and at the beginning of each year in the form of a code of conduct. Anticipated behaviors which are not acceptable in school and an outline of appropriate consequences for each such behaviors should also be published in this document. Most schools now currently list student responsibilities, parent responsibilities, and acceptable and unacceptable behavior in student handbooks and communications sent home or picked up at registration time. Hillsborough County School system does an excellent job of informing parents requiring that this notice, given to all students, be returned with parent signature acknowledging receipt, at the beginning of each school year.

IEP Planning

IEPs often outline acceptable/unacceptable behaviors for handicapped students. This needed detail, as a preventative and communication device useable with parents, school administration, and the student, should be considered more specifically within all the various special education categorical areas. This would allow consideration of the range of behaviors individually determined between what is

unacceptable and acceptable and a listing of consequences that would match up to those areas. It would be the rule--not the exception--that ultimate disciplinary practices would be anticipated and planned for within each respective area with the knowledge and support of parents.

Consideration of the Behavior as Related to the Handicap

The practice of utilizing a team of school personnel knowledgeable about the child, handicapping conditions, and disciplinary procedures to consider the handicapping condition relative to the inappropriate behavior has been demonstrated as an appropriate, effective procedure. This well proven strategy should be a requirement in any policy and procedure related to disciplinary actions. A word of caution--an administrator, if directly involved in the situation as a result of initial intervention, brought the student up for disciplinary consideration by the team should only be there to explain the circumstances but not vote. This concept utilizes a group of knowledgeable individuals to consider the behavior relative to the handicapping condition and can then make the appropriate decision regarding consequences. The group should usually include the student's teacher(s), special education administrator responsible for the current program, building administrator responsible for coordinating special services within the building, school psychologist, school social worker, learning disability specialist or individual responsible for

completing the educational assessment, and speech therapist and/or school nurse(where medication or health problem exists) as needed. It is important to emphasize that this is a service team responsibility and not a multidisciplinary staff conference responsibility. The significant difference is in the involvement of parents. Parental consideration is taken into account but the decision is that of the school district.

Behavior is Not Related

If a determination is made that the behavior is not related to the handicapping condition, then the child may be disciplined as any other child. This is not considered a change in placement but a consequence of breaking school rules and disciplinary action applicable as provided in preliminary district notices. If expulsion is ultimately recommended, parents shall be provided with full details of all results of the expulsion recommendation and to have a hearing before the Board of Education. If the hearing before the Board upholds the administration's recommendation to expel, the parents shall be provided an opportunity to also request a due process hearing to contest the inappropriateness of the present placement and the delay in provision of services resulting from disciplinary action.

Stay Put Rule

In the event that a due process hearing takes place, the child shall remain in his previous educational placement

unless the school district and parent agree upon an alternative. If disagreement occurs about the child remaining in school or needing an alternative placement while proceedings take place, the school district must go to court to request an injunction to change the placement until administrative and/or judicial proceedings are completed.

Seeking an Injunction

The burden for seeking an injunction to remove a student from his present placement while due process and/or judicial proceedings are being completed falls directly on the school district. The school district should include in its policy the provision granting authority and designating specific district administrators who may file a request for injunction.² A legal brief necessary to complete this process is available from the court. The process requires going to the court chambers and can be completed within two hours. The term dangerousness needs to be repeated and emphasized during this whole procedure. Dangerousness and a threat to self and/or others supersedes any special education law. Immediate removal has been widely upheld as being necessary for school officials to exercise in order to maintain safety in the school. Typically, parents will agree to an alternate placement where such circumstances of dangerousness exist. The alternatives that have been

²It is strongly recommended that preliminary arrangements for this procedure to be processed and developed with the assistance to the school board attorney.

successfully used include independent study through the mail, telephone instruction, teleclass instruction, and home tutoring. Home tutoring is not a viable option where a student continues to be a threat to other individuals after the initial cooling off period.

Behavior is Related

In those instances where the professional team has determined that the misconduct is related to the handicapping condition, a multidisciplinary staff conference should be convened immediately. It is important to note that this would include the parents, and require notice of time, place, purpose, and who will be attending. Consideration of the behavior should be made in this multidisciplinary staff conference to determine continued and/or change in eligibility and placement for the student. Additional assessment, if needed or provided independently by the parent, can be recommended and/or considered at this conference. Based on the defined need from this multidisciplinary staff conference, the IEP will be modified if needed.

Least Restrictive Environment--LRE

Based on this modification and/or existing IEP, placement alternatives and/or provision of related services will be considered and implemented accordingly. This implementation should be consistent with previous consideration of the education provided giving consideration

to using supplemental material and support services in an environment with non-handicapped students to the greatest extent possible.

Due Process Hearing

Should parents disagree with recommendations from this process, they should be given the opportunity to request a due process hearing. In the event that a due process hearing is requested, the placement of the child shall be stayed unless parent and school district agree upon an alternative placement. The option exists for the school district to go to court to secure an injunction to restrain the student from participating in the current program until the administrative due process hearing is completed and/or formal litigation has taken its course. This whole procedure needs to be clearly spelled out and readily available in language the parents can understand.

Mediation

A non-biased, independent mediation system is recommended to be developed and implemented. Mediation officers or a source of mediators should be the recommendation of a joint committee made up of school administrators and parents. Formal training in conflict resolution should be provided by state or local sources. Parents should have a resource within the district for contact regarding assistance in the use of this process as well as assistance in the due process hearing procedures.

The clearly stated goal of early remediation and resolution of conflict should be well defined and prominent in all of the information provided in correspondence to parents regarding their rights and responsibility assisting in the resolution of conflict. Prior to formal implementation of this process, these procedures should be cleared through the state office of education to ensure that all positive, preventative measures are seen as just that and are not seen as in any way delaying the parent's right to a due process hearing as formally prescribed by law.

Offers to Settle

Early dispute resolution and offers to settle made early after careful review of all aspects of the case should be a requirement written into all policies. The avoidance of paying attorneys fees is now a reality and should be a catalyst to early resolution as well. This process can be facilitated by completing a comprehensive routine check of procedural deficiencies and liabilities. School board attorneys are also an excellent proactive, preventive consultant resource for preparing this check list and/or case review and preparation of an offer to settle. Such offers are required to be submitted no latter than ten days prior to the implementation of the due process hearing procedure.

Inservice

Once the completed policy and procedures are approved by the board of education, an intensive in-service should be provided for all district staff and parents. Parent inservicing should be available when any child is initially placed in any special program or service and throughout the year at various times and places to accommodate the variety of schedules of parents. Parent inservice, if possible, should be provided through the combined efforts of the administration and an established parent advisory board.

Public Review and Comment

Annually, policies and procedures should be available for public review and comment. Routine assessment should occur each year internally for all administrators and staff as well to make suggestions and recommendations for changes.

Summary

The recommendations submitted above for consideration in local policy development are intuitive and intended to be fair and reasonable in the pursuit of quality educational opportunities for all children. The greater the participation and involvement of parents and students in all aspects of the program--including positives and negatives--can prevent inappropriate placements and services. Well established lines of communication, confidence, and trust between parents and school are ultimate goals for all school systems. Equality of opportunity, sharing, and fairness go

along way in paving the way to reach these goals while providing appropriate education for children with special needs.

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